80-436

Supreme Court, U. S.
FILED
SEP 18 1980
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1980

No. .....

NORMAN TURKISH,

Petitioner,

— against —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether petitioner's Fifth and Sixth Amendment rights were violated when the district court refused to grant the defense application for use immunity to certain defense witnesses who had material exculpatory testimony critical for the defense case.

2. Whether the restrictive test enunciated by the court of appeals limiting any grant of immunity to "non-target" defense witnesses violates due process by placing a defendant's ability to obtain material exculpatory testimony under the complete and unreviewable control of the prosecutor, who may preclude use immunity merely by asserting that a proposed defense witness is a potential target.

3. Whether the court of appeals evaluated petitioner's claims under proper due process standards and, if not, what should those standards be.

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Opinions Below

The opinion of the court of appeals (App. A., *infra* 1a-24a) is reported at 623 F.2d 769. The memorandum decision of the district court (App. B. *infra* 25a-53a) is unreported.

Jurisdiction

The judgment of the court of appeals was entered on May 27, 1979. A motion for rehearing *en banc* was denied on July 3, 1980. On August 26, 1980, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 19, 1980. Jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether petitioner's Fifth and Sixth Amendment rights were violated when the district court refused to grant the defense application for use immunity to certain defense witnesses who had material exculpatory testimony critical for the defense case.

2. Whether the restrictive test enunciated by the court of appeals limiting any grant of immunity to "non-target" defense witnesses violates due process by placing a defendant's ability to obtain material exculpatory testimony under the complete and unreviewable control of the prosecutor, who may preclude use immunity merely by asserting that a proposed defense witness is a potential target.

3. Whether the court of appeals evaluated petitioner's claims under proper due process standards and, if not, what should those standards be.

Constitutional Provisions Involved

This petition raises claims under the due process and compulsory process clauses of the Fifth and Sixth Amendments to the Constitution respectively. The relevant portion of the Fifth Amendment provides:

> "[N]or [shall any person] be deprived of life,, liberty, or property, without due process of law [.]"

The relevant portion of the Sixth Amendment provides:

> "In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

Statement of the Case

1. The issue raised by this petition—whether a defendant is entitled to have immunity conferred upon witnesses having exculpatory evidence, but who invoke their privilege against self-incrimination—is an important one. It is one that, as the court of appeals noted, has been appearing before the courts with increasing frequency (5a). Moreover, as the court also noted, a fundamental conflict exists between its decision in this case denying petitioner relief and that of the Third Circuit in *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980), in those instances where the government asserts a witness is suspected of criminal involvement.

2. Petitioner was charged in the United States District Court for the Southern District of New York with conspiracy to defraud the United States (18 U.S.C. 371) and with evading income taxes and filing false income tax returns (26 U.S.C. 7201, 7206). After a lengthy trial and four days of jury deliberation during which the jury asked by name why three witnesses (whom the defense had subpoenaed and for whom use immunity had been sought) were not called, petitioner was convicted (47a).

3. The government's case was based in substantial part on the testimony of witnesses who received some form of immunity (4a). The government's evidence was to the effect that petitioner was a principal in an alleged scheme that permitted an oil company, C. R. Rittenberry & Associates, Inc. ("Rittenberry") to defer income taxes by use of tax straddles (the simultaneous purchase and sale at different prices of equal numbers of crude oil futures contracts to be performed in different months). By locking in a loss immediately, Rittenberry would be able to deduct the loss from its tax return in one year to be offset by a gain in the next year. The advantage to Rittenberry, of course, was the use of the money from

the tax saving for a year. According to the government, while conceding that tax straddles were not unlawful, what made petitioner's conduct illegal was his alleged control of the trading ring on the New York Cotton Exchange. This, the government asserted, made the tax straddles a risk-free arrangement and, therefore, fraudulent. The specific conduct condemned was petitioner's alleged control of the prices and the use of wash and prearranged sales (2a-3a).

As for the latter two items, the defense position was in part that the crude oil futures market was a brand new commodities market and that in order to develop public interest in the new market, the New York Cotton Exchange officials had urged the principal government witness, Joseph Hamilton (who received transactional immunity) and other brokers to engage in the conduct which the government now claimed was illegal. To prove this defense, the petitioner unsuccessfully sought statutory or judicial immunity for two of these exchange officials. During its lengthy deliberations, the jury returned and inquired why one of these witnesses was not called (47a).*

As for the government's claim that petitioner manipulated the price of the contracts, petitioner sought to show that the price fluctuations which the government sought to ascribe to petitioner were in fact the result of the actions of a principal of the Genora Trading Company ("Genora") who was acting on behalf of himself and family interests. The objective of the Genora trades was long-term capital gains and, as the district court

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* In accordance with the district court's memorandum decision (25a), no names will be used in this brief when discussing proposed defense witnesses.

noted, this information was "significant because the market manipulation facilitated long term capital gain, although Rittenberry was not seeking long term capital gain through its straddles" (50a). Here again the government opposed and the district court refused to grant the defense's application for either statutory or judicial use immunity for this witness. The jury also asked why this obvious defense witness was not called.

Another significant proposed witness was an official of Rittenberry whom the defense contended had directed the Rittenberry straddles (51a). There was no claim in the indictment or in the government's bill of particulars that this witness was a co-conspirator. Yet when the witness, on the advice of counsel refused to testify, the government opposed use immunity for this witness. Here, again, the jury inquired why this witness (again obviously a defense witness) was not called.

These three witnesses, the exchange official, the Genora principal and the former Rittenberry official were the most important for the defense, as the jury's inquiry about them by name indicates. As for the other witnesses for whom immunity was sought, while petitioner believes the district court's opinion unfairly and erroneously discounts the materiality of their testimony, the opinion does summarize the defense position as to these witnesses. See 46a-52a. Rather than repeat that summary here and unnecessarily extend this petition, we invite the Court's attention to that of the district court's opinion discussing the relevance of the testimony of these witnesses for whom immunity was sought.

Reasons for Granting the Writ

1. This case presents an issue of exceptional importance to the fair administration of the criminal law. The question, which has not previously been addressed by this Court, is whether due process standards as well as the Sixth Amendment require that a defendant be able to obtain material, exculpatory testimony from witnesses who assert their privilege against self-incrimination. The issue is raised in a context where the government has immunized its principal witnesses and, furthermore, offered no justification for its complete refusal to immunize any of the proposed defense witnesses. Moreover, as the court of appeals observed (17a), its decision denying petitioner relief was "in fundamental disagreement with the standards outlined" by the Third Circuit in *Government of the Virgin Islands* v. *Smith, supra.* Thus, this petition meets the requirements of both subdivisions (1) (a) and (1) (c) of Rule 17.

2. The court of appeals held that the mere assertion by the prosecution that a witness is a potential target of an investigation was sufficient to preclude relief although the court stated that under "some circumstances not now anticipated" relief might be granted (17a). Furthermore, no hearing is to be had on the issue once the prosecutor files an *ex parte* affidavit "setting forth the circumstances that support the prosecutor's suspicion of the witness' criminal activity" (20a).

Under the stringent standards enunciated below, the federal judiciary is effectively precluded from any role in assuring that a defendant can obtain material, exculpatory testimony from witnesses who for any reason (whether truly justified or not) assert their privilege against self-incrimination. The court of appeals thus abandons any effort to perfect its ability to do what has normally been thought of as a federal court's primary purpose in a criminal trial—that function being, to

further the search for and ascertainment of the truth, especially when the failure to do so may adversely affect a defendant's right to a fair trial. Despite the burdens that may be imposed upon the judiciary, this Court has always sought to further the accuracy of the fact-finding process in federal criminal trials. See, e.g., *United States* v. *Wade*, 388 U.S. 218 (1967). Just as worrisome, however, is the court of appeal's decision to place in the hands of every prosecutor the complete and unreviewable power to deny a defendant testimony that is critical to his defense. Thus, whether in any particular case this power has been exercised for justifiable reasons or merely tactical advantage is no longer a subject for inquiry by the court or by the defense in the Second Circuit.

A close examination of the court of appeals opinion indicates that in its essence it represents a loss of confidence in the ability of federal courts to find some means of resolving the conflict between the important interests involved. Instead of seeking to balance the public interest in effective criminal law enforcement and the defendant's right to present a meaningful defense, as the Third Circuit has attempted to do, the court of appeals here completely sacrifices the interests of the defendant. Neither the Constitution, public policy or other considerations require such a complete disregard of the defendant's rights. See *Hampton* v. *United States*, 425 U.S. 484, 491 (1976) (Powell, J., concurring). The opinion does not withstand analysis and is simply wrong and unjust.

3. With respect to the petitioner's Sixth Amendment claim, the court of appeals stated that "it was difficult to see how the Sixth Amendment of its own force places upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity" (10a). But in *United States* v. *Nixon*, 418 U.S. 683 (1967), this Court held that the constitutionally based executive privilege of the

President had to yield to the more "imperative" compulsory process claim for "evidence needed by the prosecution or *by the defense*" (id. at 709; emphasis added). Here we do not even have a conflict of constitutionally based rights for the values protected by the witness' privilege can be completely safeguarded by the grant of use immunity. *Kastigar* v. *United States*, 406 U.S. 441 (1972). Thus, the court of appeal's summary dismissal of petitioner's Sixth Amendment claim is analytically unsound. Indeed, the Sixth Amendment right flows naturally from prior case law. See Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 Harv. L. Rev. 1266 (1978). The "difficult[y]" is not the validity of petitioner's Sixth Amendment argument, but how to reconcile that claim with the public interest in effective prosecution (10a). It is submitted that a reconciliation can take place that does not require the utter rejection of petitioner's interests as the court of appeals has done.

While dismissing petitioner's compulsory process claim out of hand, the court of appeals stated that "a more plausible basis for defense immunity [exists] in the more general and perhaps developing requirement of basic fairness protected by the Fifth Amendment's Due Process Clause" (10a). The first of petitioner's two due process arguments, however, the court found "entirely unpersuasive" (10a). This argument refers to the inherent unfairness in allowing the prosecution the advantage of being able to immunize its witnesses, while the defendant may effectively be precluded from presenting a defense because he lacks that option. In response, the opinion points out that a criminal prosecution "is in no sense a symmetrical proceeding" (10a-11a). A little later on the court of appeals concludes its discussion of this argument with the statement that "equalization is not a sound principle on which to extend any particular procedural device" (11a). Of course, a federal criminal trial is not a symmetrical proceeding; the various constitu-

tional guarantees contained in the Bill of Rights make that proposition obvious. But these Constitutional rights or imbalances are not ends in themselves. They were designed to create a process whereby to the maximum extent humanly possible an innocent defendant would not be erroneously convicted. The defense argument is simply that where the government is given a new and effective procedural device to obtain evidence (which the use immunity statute certainly is) a serious question must immediately arise when that procedure is denied to a defendant. Considering the resources and discovery means already available to the government to present its side, this tool ought properly to be made available to a defendant unless good justification is shown otherwise.

To support its conclusion that it should not be available, the court of appeals makes the *reducio ad absurdem* argument that "[f]ew would seriously argue that wiretapping, search warrants and similar investigatory tools be made available to a defendant" (11a). What this argument ignores is that each of the specific investigative tools mentioned by the court of appeals involve substantial interference with the interests of third parties. Use immunity, on the other hand, poses no such problem since it fully protects the witness.

The issue here then is one of fairness and to what extent are the courts under the due process clause to prevent procedural rules of any type from impairing a defendant's ability to present exculpatory evidence. *Chambers* v. *Mississippi*, 410 U.S. 284 (1973).

The opinion below recognizes "somewhat greater force" (11a) in petitioner's second due process argument, namely, that "to the extent that a trial is search for the truth, denial of defense witness immunity may in some circumstances unfairly thwart that objective" (10a). As to this argument, the court of appeals acknowledges that it is not any lack of logic or precedent which concerns the

court (16a), but rather the adverse affects of use immunity for defense witnesses on the "public interests" or "public concerns" (12a). Although not explicitly defined, the term obviously refers to effective prosecution.

While recognizing that use immunity permits the government to prosecute the witness, the court of appeals argues that where use immunity is granted, "the obstacles to a successful prosecution can be substantial" (12a), and these difficulties require rejection of petitioner's needs. Petitioner does not deny the existence of these difficulties, but the flaw in the court of appeals' analysis—and this reflects the basic error in its entire approach to the problem—is that it assumes that the balance of interests will operate in the same way in every case. And this is clearly not so. Of course, whether subsequent prosecution would be substantially impaired should be a consideration, perhaps a decisive one, that decision can and should be made in the context of a particular case. In this way, a court can and should consider, for example, what evidence the witness can provide for the defense case and what evidence the government already possesses against the witness and whether careful planning or scheduling can minimize or avoid any prejudice to the prosecution.* Also, it may well be that in the particular case a prosecution of the witness is in any event unlikely. The statute of limitations has or may be about to run. The witness' involvement may be so minimal that prosecution is improbable even if additional evidence might subsequently be obtained. The witness may be already under indictment for equally serious crimes, and the government is unlikely to devote any further resources to another prosecution if the first one

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* See the discussion in footnote 23 of the district court's opinion (pp. 45a-46a) as to a possible procedure for determining the significance of the proposed testimony without prejudicing a future prosecution.

is successful. Perhaps prosecution of the witness will never ensue because it would not comport with the Department of Justice's own guidelines or priorities. Should not there be inquiry into these issues in the particular case to see whether the public concerns are substantial or non-existent, rather than assume that the public interest requires rejection of use immunity for all "target" defense witnesses in all cases?

The same considerations apply to the court of appeals' concern that the prosecution may be forced to curtail its cross-examination of a witness to avoid tainting a subsequent prosecution. Here, again, the concern should be weighed not in the abstract but in the context of a concrete case.

The argument that defense witness immunity "could create opportunities for undermining the administration of justice by inviting cooperative perjury among law violators" (13a), is, of course, also of concern, but it is not nearly as potent as claimed. Fortunately, most jurors are not fools and they are quite capable of reading through such maneuvers. Indeed, there is a certain disingenuousness in this argument by the government for as any experienced criminal trial lawyer knows, the testimony of a less than reputable "alibi" witness often only serves to remove whatever doubts the jury might have had about a defendant's guilt. But, once again, what is more important is the need to ask whether the concerns expressed apply in a particular case.

It is important to know, for example, what the relationship of the proposed witness to the defendant is. If it is not one that is likely to lead to the tactics about which the court of appeals expressed concern, this should affect any evaluation of whether defense immunity should be available. Here, again, rather than dealing with abstracts, the court should deal with the concrete case for it may well be that the defendant and the witness are

strangers or that the privilege claim by the witness is more the product of a cautious lawyer's counsel than a real risk of self-incrimination.

To the balancing approach suggested here, the court of appeal's response is that the "concerns previously expressed are matters normally better assessed by prosecutors than by judges" (15a). It is submitted that where one is dealing with an issue that goes to the very purpose of a criminal trial—to determine a defendant's guilt or innocence—this assessment cannot be left to a prosecutor. It is simply an exercise in fantasy to expect that a young prosecutor who is an advocate will consider the defendant's interests in making a decision whether to name a potential defense witness as a potential target even if that witness's involvement is peripheral. Moreover, under the limited judicial review permitted by the court of appeals, there is realistically no way that a defendant can establish that the prosecutor is not acting in good faith in his refusal.

For these reasons, a court upon a fair showing by a defendant of his need for the witness's testimony should be entitled to require the prosecution to justify its refusal other than by a mere assertion in an *ex parte* affidavit the prosecutor can make a showing that there is an "ongoing investigation" or that the witness is suspected of having criminal involvement. The court should be able to ask the kinds of questions suggested here to see if the public interest would truly be prejudiced by the grant of use immunity in the particular case. Such an inquiry would be no different from the procedure which the courts have followed when confronted with analogous claims of privilege by the executive. Thus, in the area of the informer's privilege, the Court has held that the public's need for the informer's privilege cannot prevail completely over the defendant's need for his testimony. *United States* v. *Roviaro*, 353 U.S. 53

(1957). Moreover, in weighing the informer's privilege against the public's interest, the courts have been able to develop guidelines which arrive at a balance that reasonably protects both interests. See also, *United States* v. *Nixon, supra; United States* v. *Lopez*, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971) where the district court excluded the defendant, but not his attorney, during a pretrial suppression hearing in order to preserve the integrity of the hijacker profile.* Thus the argument of the court of appeals that the formulation of meaningful standards for defining, assessing and weighing the interests involved will prove to be an "elusive" task is without basis (16a).

In addition, the government's adamant and across the board refusal to agree to use immunity for any of the defense witnesses, such as occurred here, must be troubling to anyone who sees the prime purpose of a trial as a search for the truth. Judicial deference is not due such an unjustified, non-discriminating refusal to consider petitioner's needs. This is illustrated by the government's response to petitioner's application here. For example, there was the Rittenberry official who the defense contended directed the straddles for Rittenberry and about whose absence the jury inquired. The government's refusal to grant this witness use immunity is certainly inexplicable and disturbing, particularly since this witness was never named by the government as a co-conspirator in its indictment or bill of particulars and was even subpoenaed by the government for the trial. In addition, at least one critical witness, the Genora principal (about whom the jury also inquired) was

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* In *Davis* v. *Alaska*, 415 U.S. 308 (1974), the Court held that under the Sixth Amendment's confrontation clause a state rule which forbade court disclosure of a juvenile record as privileged information was outweighed by the defendant's need to elicit material evidence relating to the possible bias of a juvenile witness who was on probation.

already under state indictment arising out of the same joint investigation. As to him, there can be no realistic concern that he would escape prosecution or have a tainted evidence argument. Consequently, the government's blanket refusal to consider the witnesses individually here and to weigh the defendant's needs in the equation must surely cause concern. Such rigidity in the face of a defendant's compelling need for a witness' testimony not only invites judicial intervention to assure a fair trial, in the most important sense—guilt or innocence—but requires judicial action to right the balance.

4. Despite the fact that the issue raised here is concededly important and there is a split in the circuits, no doubt the government will argue that review is inappropriate because of the court of appeal's alternative holding that petitioner's application was untimely and that the expected testimony "would either have been cumulative, immaterial or impeaching on collateral matters" (19a). Neither point is well-founded.

a. Timeliness

To begin with, we would simply note, first, that in *Government of Virgin Islands* v. *Smith*, *supra*, 615 F.2d at 967, the claim for defense immunity was also raised during the defense case. Second, no prejudice was ever shown by the government here because of the alleged tardiness of the application. The district court's basis for finding untimeliness here was that sufficient time passed between the first pre-trial conference and trial for defense counsel to have been able to notify the government and the court of its desire that immunity be granted certain witnesses, and that by waiting until after trial had begun, the prosecutors were unfairly required to evaluate the requests in the middle of the trial.

The argument is plainly specious. There was no prejudice to the government. As the record makes plain (SEALED Tr. 5516-18), the government made a substantive determination not to immunize. The decision not to seek immunity for the witnesses was not made by the trial assistant himself, but by his superiors in the office including the United States Attorney personally with whom the trial assistant discussed the matter "at some length" (SEALED Tr. 5516). Thus, an argument that the government did not have time to consider the application is disingenuous.

Similarly, the district court's assertion (34a) that the making of the request at the close of the government's case raised a double jeopardy problem for the government is a pure after-the-fact rationalization. This problem was never voiced at trial. If petitioner had been asked whether he would accept a mistrial so the government would have more time to evaluate the request and had refused to agree, then there might have been some claim that the government was being prejudiced. But there was no such motion and, of course, there was no refusal. To find a waiver of a serious constitutional claim on such a basis does little service to the cause of the fair administration of justice.

Furthermore, with respect to those proposed defense witnesses who were floor brokers—those allegedly were also recipients of payments—their names were only learned by defense counsel during the cross-examination of a government witness (Tr. 1034-36). As to the witnesses, there clearly can be no claim of untimeliness.

More important, however, the immunity statute does not by its own terms authorize an application by defense counsel for immunity. Yet defense counsel is charged with waiving the issue for not having sought relief before trial although there is no statute, rule, or court rule

which prescribes such a procedure. The trial court itself observed that this is a case of "first impression" (Tr. 5556 SEALED). Hence, there is no rule, case law or other rationale to which one can attribute a waiver of an important constitutional right. Even if one is prepared to fault defense counsel for his failure to move more promptly, one cannot ignore the fact that we are here dealing with a direct appeal of a conviction which raises a serious constitutional issue with respect to the very fairness of the fact-finding process. The error of counsel cannot preclude review in these circumstances. We are not here dealing with a Fourth Amendment search and seizure case where the exclusionary rule seeks to further policies unrelated to guilt or innocence and failure to raise the point may justify the court's refusal to consider it. See: F.R. Crim. P. 12(b). The issue here goes to the heart of a fair trial—whether the petitioner was deprived of a fair opportunity to present a defense and the error of counsel should not preclude review in these circumstances. See *Wainwright* v. *Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring opinion); see, also, Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970).

Where the government can show no prejudice, a defense counsel's failure to move pre-trial rather than at the close of the government's case can hardly be deemed to constitute a waiver of constitutional claim, especially on an issue which the district court itself held was "one of first impression." (Tr. 5556 SEALED).

b. Materiality

The district court concluded that the testimony of the proposed defense witnesses would not be material (defined by the district court as unlikely to affect the outcome of the case). This conclusion is unsupported by the record.

One reason offered by the district court for this conclusion was its assertion that the case against petitioner was overwhelming. Inasmuch as the case against petitioner rested almost completely on the testimony of immunized or convicted but unsentenced co-conspirators, it is difficult to see how the case was "overwhelming." With regard to the tax counts, the testimony of these interested witnesses inculpating petitioner was wholly uncorroborated. As to the conspiracy count, the government had two disinterested expert witnesses on the issue of the proper operations of a crude oil commodities market. Again, the district court's ruling on the immunity issue prevented petitioner from showing that these two witnesses' testimony was not accurate. But in any event these two witnesses did not corroborate any immunized witness' testimony as to petitioner's role in the conspiracy. Thus, it is difficult to understand how it can be asserted that a case resting, in essence, on uncorroborated testimony of interested witnesses can be deemed "overwhelming" especially in the face of constitutional error. *Webb* v. *Texas*, 409 U.S. 95 (1972).

Moreover, this supposedly "overwhelming" case not only required four days of jury deliberation before a verdict was reached, but during the course of these deliberations, the jury inquired why the three most important defense witnesses for whom the petitioner sought use immunity, had not testified. Their testimony was relevant to three critical issues that the evidence raised. Obviously, the jury was not overwhelmed by the government's case, but it was troubled by the absence of these witnesses, whom of necessity it must have believed should have been called by the defense and who were in fact subpoenaed and called by the defense, but who asserted their privilege against self-incrimination.

As for the cumulative nature or immateriality of the proposed testimony, the other two reasons offered by the district court for its conclusion, the analysis by the district court of the testimony of each of the

proposed witnesses is flawed and, especially, in its analysis of the most critical witnesses. In each instance, the district court either offers no reason for its conclusion that the testimony was immaterial, cumulative or, if a reason is offered, it is not supported by the record. For the sake of brevity, we deal with only the most important defense witnesses as to whom there can be no reasonable question of the significant exculpatory nature of their testimony.

(i) Cotton Exchange Officials

A critical part of the government's case was its attempt to show that wash sales, prearranged sales and piecemeal trades were improper and accordingly were done to carry out the illegal conspiracy. It was the defense position that prearranged trades were not only not illegal, but were a necessity in the new crude oil market. For brokers to take the other side was therefore a normal practice. Moreover, the wash sales had been approved by the officials of the exchange (Tr. 1446-49; 1517). Such testimony by these officials would have been relevant to negate the criminal intent and to show that such conduct was counterproductive to the objectives of the alleged conspiracy. The district court found that such testimony would not have affected the outcome of the case, was not material to the issues presented in the indictment and was, in any event, cumulative (47a). The second ground—lack of materiality—simply does not stand up. If prearranged sales are not only not improper, but also necessary for a new commodities market and wash sales were approved as a promotional device by the officials of the exchange, then there was nothing illegal or dishonest in the execution of the tax straddles. Even more so, such testimony was certainly relevant to the jury's evaluation of criminal intent on Count I. The testimony of these officials would have seriously undermined the criminal conspiracy argument of the government.

As for the district court's first ground for rejecting the request—its lack of likely effect upon the jury—that analysis is undercut by the fact that the jury itself asked why one of the officials had not testified. In response to the common sense argument by defense argument that such an inquiry obviously indicates the importance of having the official testify, the district court, in a classic *non-sequitur*, states that it was "confident" that the jury followed its instruction to draw no inference from the failure of the official to testify (47a). But the issue under consideration here is not whether the jury hearkened to the judge's charge, but whether if the official had testified and supported the defense position would it have affected the outcome of the case. The jury's inquiry is as good an indication as any that it would have.*

Finally, the district court found the proposed testimony of these officials cumulative upon the ground that the defense had obtained what it wanted through the testimony of petitioner, and a co-defendant, one Conlin. Acknowledging that the testimony of defendants might not be as credible to the jury, the district court, nevertheless, concluded that since the co-defendant was acquitted, the jury must have found him credible. This also is a specious argument. As this case was tried, the jury's acquittal of Conlin could have been for any reasons unrelated to his credibility, in general, let alone to this issue. The fact remains that the testimony of the defendants could never be as persuasive as that of the exchange officials.

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* Moreover, the trial court's confidence that the jury would follow its instruction was under the circumstances misplaced, since for the charge to have any neutralizing effect, the jury should have at least been told that attempts had been made to obtain the presence of the witnesses.

(ii) Rittenberry's Financial Vice-President

Noble, a consultant for Rittenberry, testified without immunity—that all the Rittenberry tax straddles were determined by the Financial Vice-President for Rittenberry in conjunction with other accountants and employees of Rittenberry. This testimony undercut the thrust of the government's case against petitioner. But Noble could not testify directly what the Vice-President had done and, furthermore, had left Rittenberry before the second straddle in 1975 (Tr. 5864-65).

The district court acknowledged that Noble's testimony could not be as effective as the Financial Vice-President's, but the district court found the testimony would not have affected the jury's verdict since the evidence against petitioner was "overwhelming". We have already dealt with this contention. Moreover, the district court's statement that the jury's verdict could not have been affected by testimony of this witness simply does not hold up. The jury by its question concerning the Rittnberry official's failure to testify saw the obvious relevance of his testimony.

In addition, the district court proffered an explanation as to how the witness' testimony might not have helped petitioner. Despite the fact that the witness had not been named as a co-conspirator, the witness, the court asserted, could have been a co-conspirator or a dupe. Under our system the jury is supposed to make this finding and certainly a district judge who has not even heard the witness is not in a position to make such a judgment. Only the jury could determine what the witness' and petitioner's roles were and if the witness testified as Noble indicated the facts were, the jury might well have chosen the third, equally likely, explanation and brought in an acquittal.

In short, notwithstanding the court's analysis of how the jury *might* view the evidence, it is at least as likely that such testimony would have, after four days of deliberation, a jury verdict in favor of petitioner. Both parties had subpoenaed this witness and the jury as well wanted this witness' testimony. However, because of the government's blanket refusal to immunize all proposed witnesses including this one, such testimony was not heard by the jury. This witness' testimony under any analysis of the facts was material to the jury's evaluation of the case against petitioner.

(iii) Principal of Genora

The government, as part of its case, had maintained through Hamilton's testimony that it was an objective of the conspiracy, on petitioner's orders, to bring the market down to $8.50 and then up to $12. The defense sought to show through the cross-examination of Hamilton and Blitzer, a government statistician (Tr. 918-21, 899) as well as through petitioner himself that Hamilton's testimony was not true. What the defense sought to establish was that this market movement was consistent with the personal and family objective of a principal of Genora, who was seeking a short-term capital loss on the market's downward movement and by liquidating the position on a long-term capital gain basis when the market went up. In this connection Hamilton conceded on cross-examination that for the Rittenberry straddle—(all of whose gains or losses would be ordinary since it was in the oil business)—market movement in any direction was sufficient to achieve the desired result (Tr. 918-21).

The jury was troubled by the failure of this witness to testify* and so inquired of the court concerning his

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* As noted above, this witness was already under indictment by the State for related crimes.

absence. His absence worked to the defendant's prejudice. Had the jury heard this witness' testimony confirming the defense contention, this obviously would have painted a quite different picture of petitioner's role in the market than that portrayed by the government. The district court's ruling that this witness' testimony would not have affected the jury's consideration of petitioner's role vis-a-vis Rittenberry clearly ignores how this case was tried for if Hamilton was discredited as to his claims about petitioner's involvement in the Genora trades, there would be little reason for them to credit Hamilton's testimony on the Rittenberry trades.

(iv) Floor Brokers in Crude Oil

At least four of these brokers were important to the defense on the alleged money transfers (the tax counts). They would have shown that the monies conveniently put by the government's principal immunized witness, Hamilton, into petitioner's pockets were in fact used by the witness for other purposes and the money claimed to have been paid to petitioner from the so-called "97" account, through which Hamilton operated his numerous dealings, could not have gone to petitioner. As to this issue, the district court did not find that this testimony was cumulative or otherwise insignificant, but stated that since the testimony regarding money transfers was brought out on cross-examination, the defendants could not attempt to rebut it by extrinsic evidence, citing Fed R. Evid. 608(b). The district court's ruling either misconceives the impact of the proposed testimony or misinterpreted the evidentiary rules. Extrinsic evidence may be excluded, where its sole purpose is impeachment of the witness, but here, aside from impeachment, the testimony was directly relevant to an important issue in this case, namely, the disposition of the monies, which Hamilton claimed he gave petitioner. Thus if the petitioner could show the money going through the account went

to others, this would have done more than simply show that government witness Hamilton was a liar on some point, but that petitioner never received the money which he is alleged not to have reported. We are not dealing here then with a collateral issue and the district court's ruling here plainly is wrong.

Moreover, Hamilton was unable to remember—or so he testified—how much money he gave some twenty people in these cash transfers (Tr. 1036). The government made no attempt to reconstruct the activities in Hamilton's "97" account. The district court's ruling effectively barred petitioner from doing so and thereby establish his defense on the money transfers issue. To say that such testimony on the very issues of the case is collateral as relating to credibility only, is unsupportable.

To summarize, each witness or group of witnesses above were material—defined as likely to effect the outcome of the case—to one or more important and disputed issues at trial. The testimony of any one of the more significant witnesses may well have been critical to establishing petitioner's defense. Had the jury heard the testimony of only the witnesses about whom it inquired as to why they were not called, an acquittal would not only have been likely, but as to the conspiracy count almost inevitable.*

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* The conspiracy count, unlike the tax evasion or false statement counts, has and will prejudice petitioner's future livelihood and therefore is the most devastating in its impact on the petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD PODOLSKY, ESQ.
Attorney for Petitioner

DAVID G. TRAGER, ESQ.
of Counsel.
September, 1980

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 608, 795—September Term, 1979

Argued: January 15, 1980 Decided: May 27, 1980

Docket Nos. 79-1326, 79-1396

UNITED STATES OF AMERICA,

Appellee,

—v.—

NORMAN TURKISH,

Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and NEWMAN,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York (Vincent L. Broderick, Judge), convicting appellant after jury trial of income tax and conspiracy offenses in violation of 26 U.S.C. 7201, 7206 and 18 U.S.C. 371.

Affirmed.

RONALD PODOLSKY, New York, N.Y., *for defendant-appellant.*

ALLEN R. BENTLEY, Asst. U.S. Atty., New York, N.Y. (Robert B. Fiske, Jr., U.S. Atty., Gregory L. Diskant, Asst. U.S. Atty., New York, N.Y., on the brief), *for appellee.*

Appendix A

NEWMAN, *Circuit Judge:*

This criminal appeal concerns primarily the issue of whether a defendant is entitled to have immunity conferred upon defense witnesses who invoke their privilege against self-incrimination. The appeal is brought by Norman Turkish, who was convicted by a jury in the Southern District of New York (Vincent L. Broderick, Judge) of evading income taxes and filing false income tax returns, 26 U.S.C. 7201, 7206, and conspiring to defraud the United States, 18 U.S.C. 371. The trial of Turkish and three co-defendants lasted 11 weeks. Turkish and one co-defendant were found guilty; only Turkish appeals.

The Government's evidence established that Turkish was a principal participant in a scheme that used fraudulent means to enable C.R. Rittenberry & Associates, Inc., an oil company, to create artificial tax losses in one year, offset by equally artificial taxable gains in a subsequent year, thereby postponing for a year the taxes on millions of dollars of corporate income. The scheme involved the use of tax "straddles," the simultaneous purchase and sale at different prices of equal numbers of commodity futures contracts to be performed in different months. In the normal use of tax straddles, opportunities for arguably lawful tax avoidance are created when the market price varies from the prices at which the original contracts were both bought and sold. If the market declines, the trader offsets his purchase with an equivalent, thereby locking in a tax loss on his original purchase. He then offsets his original sale contract with an equivalent purchase, thereby locking in an approximately equal profit on his original sale contract. He benefits when the profit is taxable in the year following realization of the loss. In normal transactions the trader takes the risk that market price movements will be too narrow to create much opportunity for tax postponement and also the more serious risk that prices will not move uniformly with respect to both his original contracts. In the latter event

the profit available to be locked in may be less than the locked-in loss. Turkish and others avoided these risks by fraudulently manipulating virtually the entire business of one trading ring on the New York Cotton Exchange, the Crude Oil Futures Market. This enabled them to move prices up and down at will, so that Rittenberry could take short-term capital losses during one tax year and defer an equal amount of off-setting capital gain to a subsequent year, all with no risk and a considerable saving in the postponement of taxes. Turkish not only orchestrated the fraudulent aspects of the scheme but also evaded taxes on the money he received as compensation for his role.

I.

The Indictment

Turkish contends that his conviction should be reversed because the conspiracy count of the indictment (Count One) did not charge an offense and was unconstitutionally vague. The conspiracy count alleged that Turkish and others conspired to "defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury in the collection of income taxes." The crime of conspiring to defraud the United States, 18 U.S.C. 371, includes acts that "interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery," *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). The creation of artificial tax losses for a business by fraudulent manipulation of prices in a commodity market qualifies as such an act. Turkish contends that there would have been no crime had the oil company not taken the resulting losses as tax deductions. Even if the manipulation of prices was not, by itself, a federal offense, it became evidence of a federal offense when it was done to avoid federal taxes. The Government alleged that Turkish's activities on the Crude Oil Futures market were part of a con-

spiracy that involved other acts, not that these activities constituted the entirety of the crime.

The indictment is also sufficiently precise to meet the requirements of the Constitution and the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 7(c) states, in part: "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Count One specified Turkish's alleged efforts to manipulate the Crude Oil Market in order to create tax losses for his co-defendant's client. This was sufficient to inform him of the charges against him, and to enable him to prepare his plea and his defense accordingly. See *Hamling v. United States*, 418 U.S. 87, 117 (1974).

II.

Defense Witness Immunity

The claim for defense witness immunity arose in the following circumstances. The Government presented its case by calling a number of witnesses involved in the fraudulent transactions, several of whom were co-conspirators. Of these, three had pleaded guilty to participation in the conspiracy and had received letter agreements that they would not be prosecuted for any other commodity market crimes or related tax offenses if they testified truthfully. Two other prosecution witnesses who had not been indicted received similar letters, one of which was sufficient to persuade its recipient to return from Switzerland for the trial. In addition, one prosecution witness was formally granted "use" immunity under 18 U.S.C. 6002.

During the trial, and after the Government had concluded its case, Turkish and his co-defendants moved that seventeen of the prospective defense witnesses be granted "use" immunity and required to testify under 6002. They

argued that these witnesses could provide exculpatory testimony, but would invoke their Fifth Amendment privilege and decline to testify unless compelled to do so. Judge Broderick invited the Government to consider granting "use" immunity to these witnesses pursuant to 6002. The Government did consider the matter, but decided not to grant immunity. Judge Broderick then reserved decision on defendant's motion until after the trial, at which time the defendants moved for a new trial or acquittal. On August 23, 1979, Judge Broderick denied the defendants' motion.

In a subsequent opinion, *United States v. Turkish*, — F. Supp. — (S.D.N.Y. 1979), Judge Broderick set forth his analysis of the issue and his reasons for denying the motion. Judge Broderick concluded that the Compulsory Process Clause of the Sixth Amendment does not give a defendant the right to require immunization of a witness, but that such a right is "probably" contained in the Due Process Clause of the Fifth Amendment. *Id.* at —. However, he declined to accord the defendants the benefit of this "probable" Fifth Amendment right to defense witness immunity for two reasons. First, he ruled that the defendants' motion was untimely, since it should properly have been made at the beginning of the trial. Second, he concluded that defense witness immunity would be available only to secure testimony that was material and exculpatory and that the defendants had not shown that any of the witnesses for whom they sought immunity would give material, exculpatory testimony.

To assess Turkish's challenges to these rulings we deem it appropriate to explore the concept of defense witness immunity, a matter arising with increasing frequency before this and other courts. See, *e.g.*, *United States v. De Palma*, 476 F. Supp. 775 (S.D.N.Y. 1979), *appeal pending sub nom. United States v. Horwitz*, No.

79-1315 (2d Cir.); *Government of the Virgin Islands v. Smith*, —— F.2d —— (3d Cir. Feb. 5, 1980).

Granting immunity to a defense witness at the defendant's request seems to have been considered for the first time, in a reported decision, by Chief Justice Burger, then a Circuit Judge, as dictum in *Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967). Since then, it has been much discussed by courts and commentators.[1] Interest in defense witness immunity was considerably heightened after Congress enacted the "use" immunity statute, 18 U.S.C. 6001-6005, in 1970, and the Supreme Court subsequently upheld its constitutionality, *Kastigar v. United States*, 406 U.S. 441 (1972). No longer did an immunity grant forbid prosecution of the witness for crimes referred to in his testimony ("transactional" immunity). Now the Government could still prosecute the witness; it was barred only from making any use of his immunized testimony, either directly by putting the testimony in evidence at the witness's trial, or indirectly by obtaining other evidence from leads that the testimony supplied.

Claims for defense witness use immunity have been uniformly rejected by this Court, *United States v. Gleason*, —— F.2d —— (2d Cir. Dec. 19, 1979); *United*

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[1] The commentators have generally been favorable to the notion of reverse immunity. *See* Westen, *Compulsory Process*, 73 Mich. L. Rev. 71 (1974); Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 Colum. L. Rev. 953 (1967); Note, *Separation of Powers and Defense Witness Immunity*, 66 Geo. L.J. 51 (1977); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 Harv. L. Rev. 1266 (1978); Note, *A Re-Examination of Defense Witness Immunity: A New Use for* Kastigar, 10 Harv. J. Legis. 74 (1974); Note, *The Public Has a Claim to Every Man's Evidence: The Defendant's Constitutional Right to Witness Immunity*, 30 Stan. L. Rev. 1211 (1978).

States v. Praetorius, —— F.2d —— (2d Cir. Dec. 10, 1979), *modified on rehearing*, —— F.2d —— (2d Cir. May 7, 1980); *United States v. Lang*, 589 F.2d 92, 96 n.1 (2d Cir. 1978); *United States v. Wright*, 588 F.2d 31, 33-37 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States v. Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); see also *United States v. Housand*, 550 F.2d 818, 823-24 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977), and by almost all circuits to consider the matter, *United States v. Lenz*, —— F.2d —— (6th Cir. Mar. 10, 1980); *United States v. Smith*, 542 F.2d 711, 715 (7th Cir. 1976); *United States v. Alessio*, 528 F.2d 1079, 1081-82 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir.), *cert. denied*, 423 U.S. 933 (1975); see *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967) (transactional immunity). The claim is a matter of divided opinion in the Third Circuit, compare *United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978); *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973), with *Government of the Virgin Islands v. Smith, supra; United States v. Herman*, 589 F.2d 1191, 1203-04 (3d Cir. 1978), *cert. denied*, 442 U.S. 913 (1979); *United States* v. *Morrison*, 535 F.2d 223 (3d Cir. 1976). Additional support for the claim has been expressed by the former Chief Judge of the District of Columbia Circuit, see *United States v. Gaither*, 539 F.2d 753 (D.C. Cir.) (Bazelon, C.J., concurring in denial of rehearing en banc); *cert. denied*, 429 U.S. 961 (1976), *United States v. Leonard*, 494 F.2d 955, 985 n. 79 (D.C. Cir. 1974) (Bazelon, C.J., concurring and dissenting), and by two District Courts, *United States v. De Palma, supra*, and *United States v. La Duca*, 447 F. Supp. 779 (D.N.J. 1978), *aff'd on other grounds sub nom. United States v. Rocco, supra*, in addition to Judge Broderick in this case.

Appendix A

The only federal appellate decisions ruling in favor of defense witness immunity appear to be the Third Circuit decisions in *Morrison* and *Smith*. In *Morrison* a divided panel of the Third Circuit reversed a conviction on the ground that prosecutorial misconduct had caused a defense witness to withhold testimony out of fear of self-incrimination. As a remedy for the misconduct, the Court ordered that upon a retrial, the Government face the choice of either granting the witness use immunity or having the defendant acquitted.

Smith involved a totally bizarre situation. A juvenile defendant sought use immunity for a juvenile defense witness. The office of the Virgin Islands Attorney General, who had exclusive jurisdiction to prosecute both the defendant and the witness, was agreeable to use immunity for the witness. However, this local prosecuting office, as a matter of "prosecutorial courtesy," —— F.2d ——, conditioned its approval upon the consent of the United States Attorney, who inexplicably declined to consent. In a thoughtful opinion Judge Garth reversed the conviction and remanded for determination of whether use immunity should have been conferred under standards explicated in the Court's decision.

These standards rest on two different concepts. First, Judge Garth considered the power of a court to order the prosecutor to grant statutory use immunity pursuant to 18 U.S.C. 6002. Such "statutory" immunity was held to be available for a defense witness with relevant testimony, —— F.2d at —— n.7, when the defendant could show that the prosecutor's decision not to confer immunity was made "with the deliberate intention of distorting the judicial fact finding process," *id.* at ——, a standard the Third Circuit had previously articulated in *United States v. Herman, supra*, 589 F.2d at 1204. Secondly, Judge Garth considered what he called "judicial" immunity, the power of a court, unaided by statute, to order

that a witness's testimony cannot be used against him. Again applying a standard earlier announced in *United States v. Herman, supra*, Judge Garth held that judicial immunity, *i.e.*, court-ordered use immunity, was available for a witness "capable of providing clearly exculpatory evidence" when the Government can present no "strong countervailing interest." —— F.2d at ——.

Though *Morrison* and *Smith* stand in sharp contrast to the uniform holdings of other federal appellate decisions that have rejected defense witness immunity, some of these decisions have been careful to deny the claim only with respect to the precise facts presented, *e.g., United States v. Wright, supra; United States v. Alessio, supra.* Furthermore, two of our decisions have explicitly left open the possibility that defense witness immunity might be required if grants of use immunity to prosecution witnesses resulted in an "unfair advantage." *United States v. Gleason, supra,* —— F.2d at ——; *United States v. Lang, supra,* 589 F.2d at 96-97. In light of this state of the case law, further consideration of the constitutional bases for defense witness immunity is warranted. Resort is usually made to the Sixth and Fifth Amendments.

The established content of the Sixth Amendment does not support a claim for defense witness immunity. Traditionally, the Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's non-privileged testimony heard, but does not carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination. *United States v. Lacouture,* 495 F.2d 1237 (5th Cir.), *cert. denied,* 419 U.S. 1053 (1974); *Myers v. Frye,* 401 F.2d 18 (7th Cir. 1968); *Johnson v. Johnson,* 375 F. Supp. 872 (W.D. Mich. 1974); *Holloway v. Wolff,* 351 F. Supp. 1033 (D. Neb. 1972); see *Royal v. Maryland,* 529 F.2d 1280,

1283 (4th Cir. 1976) (Winter, J., dissenting). While the prosecutor may not prevent or discourage a defense witness from testifying, *Washington v. Texas*, 388 U.S. 14 (1967); *United States v. Morrison, supra*, it is difficult to see how the Sixth Amendment of its own force places upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity.

Arguably there is a more plausible basis for defense witness immunity in the more general and perhaps developing requirement of basic fairness protected by the Fifth Amendment's Due Process Clause.[2] The appeal to constitutionally protected fairness proceeds from two basic arguments. First, as this Circuit hinted in *Gleason* and *Lang*, unfairness may inhere in some situations because the Government's grant of use immunity to its witnesses affords it an advantage over the defendant's ability to present a defense. Secondly, to the extent that a trial is viewed as a search for the truth, denial of defense witness immunity may in some circumstances unfairly thwart that objective.[3]

The first contention, based on equalizing the powers of the prosecution and the defense, is entirely unpersuasive. A criminal prosecution, unlike a civil trial, is in no sense a symmetrical proceeding. The prosecution assumes sub-

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[2] Defense witness immunity, a concept first developed only in the 1960s, and regarded as plausible only since the passage of the use immunity statute, cannot qualify as a due process right on any theory that it is part of the "compelling traditions of the legal profession." *Rochin v. California*, 342 U.S. 165, 171 (1952).

[3] We put to one side the situation, illustrated by *United States v. Morrison, supra*, where a court uses the option of defense witness immunity as part of a remedy for prosecutorial misconduct directed at the witness. There is no claim in this case of any such misconduct.

stantial affirmative obligations and accepts numerous restrictions, neither of which are imposed on the defendant. The prosecution must prove the defendant's guilt beyond a reasonable doubt to the satisfaction of all the jurors; it may not obtain the defendant's testimony, suppress exculpatory evidence, nor retry the defendant after acquittal, even though errors prejudicial to the Government occurred. The defendant, by contrast, may prevail without offering any proof at all; he need not disclose whatever inculpatory evidence he discovers, may avoid conviction by persuading a single juror that reasonable doubt exists, and may challenge a conviction by direct appeal and subsequent collateral attack.

The system of criminal law administration involves not only the procedural imbalance in favor of the defendant, but also important aspects of the Government's law enforcement power that are not available to the defendant. Subject to constitutional and statutory limits, the Government may arrest suspects, search private premises, wire-tap telephones, and deploy the investigative resources of large public agencies. Few would seriously argue that the public interest would be well served either by extending all of these powers to those accused of crime or by equalizing the procedural burdens and restrictions of prosecution and defendant at trial. Viewed in isolation, there is a surface appeal to the equal availability of use immunity for prosecution and defense witnesses. But in the context of criminal investigation and criminal trials, where accuser and accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle on which to extend any particular procedural device. At a minimum, such a principle will not support a constitutional interpretation of Fifth Amendment fairness.

The second argument, based on the need to pursue the truth, has somewhat greater force. As a general rule the

Government is properly obliged to divulge exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963). That principle, however, has heretofore been limited to evidence in the Government's possession and has not been extended to create a Government obligation to assist the defense in extracting from others evidence the Government does not have. Moreover the concept of a trial as a search for the truth has always failed of full realization whenever important facts are shielded from disclosure because of a lawful privilege. The key fact needed to prove a defendant's innocence may be contained in a client's privileged admission to his attorney, or a husband's privileged admission to his wife, as well as in the testimony of a witness protected by the privilege against self-incrimination. Nevertheless, it must be acknowledged that since the advent of immunity statutes, the self-incrimination privilege, unlike any other, can be displaced without any impairment of the legally protected rights of the holder of the privilege. And unlike transactional immunity, use immunity does not improve the legal position of the holder of the privilege; it leaves his legal rights precisely as they were before he testified. However, the grant of use immunity does implicate public interests, and any assessment of a claim for defense witness use immunity must reckon with those public concerns.

In the first place, while the prosecution remains theoretically free under *Kastigar* to prosecute a witness granted use immunity, the obstacles to a successful prosecution can be substantial. The Government has a "heavy burden" to prove that its evidence against the immunized witness has not been obtained as a result of his immunized testimony. *Kastigar v. United States*, *supra*, 406 U.S. at 461. While this burden can be met by cataloguing or "freezing" the evidence known to the Government prior to the immunized testimony, that technique is not available when continuing investigations disclose vital

evidence after, though not resulting from, the immunized testimony. See *SEC v. Stewart*, 476 F.2d 755, 762 (2d Cir. 1973) (Timbers, J., dissenting). Moreover, to meet its burden of proving that prosecution of the immunized witness was not benefitted in any way by his immunized testimony the prosecutors most knowledgeable about an investigation may in some circumstances be obliged to forgo any further contact with the witness and arrange for a new team of investigators and prosecutors to pursue the case against him. See *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976).

Secondly, awareness of the obstacles to successful prosecution of an immunized witness may force the prosecution to curtail its cross-examination of the witness in the case on trial to narrow the scope of the testimony that the witness will later claim tainted his subsequent prosecution. While the witness cannot prevent prosecution and secure an immunity "bath" by broadening the scope of his answers, as he could if testifying under a grant of transactional immunity, his fulsome answers may substantially lessen the likelihood of any successful prosecution.

Finally, there is considerable force to the Government's apprehension that defense witness immunity could create opportunities for undermining the administration of justice by inviting cooperative perjury among law violators. Co-defendants could secure use immunity for each other, and each immunized witness could exonerate his co-defendant at a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense. The threat of a perjury conviction, with penalties frequently far below substantive offenses, could not be relied upon to prevent such tactics. Moreover, this maneuver would substantially undermine the opportunity for joint trials, with consequent expense,

delay, and burden upon disinterested witnesses and the judicial system.

How these substantial concerns are to be weighed against the defendant's interest in securing truthful exculpatory testimony through defense witness immunity turns in large part upon whether the balancing of these interests is appropriately a judicial function. The Government suggests it is not, contending that the granting of immunity is pre-eminently a function of the Executive Branch. See *Ullman v. United States*, 350 U.S. 422 (1956). On the other hand, the judiciary has constitutional responsibilities for the fairness of a trial. Moreover, as Judge Garth has argued in *Smith*, the court can accord use immunity without directly acting in the domain of either the Legislative or Executive Branch. A court can rule that testimony may not be used against a witness without adding any gloss to the use immunity statute or directing the prosecutor to use his statutory authority. Judicially created use immunity, albeit premised on constitutional considerations, was fashioned by the Supreme Court in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964) (witness's compelled testimony barred from use by another jurisdiction), and in *Simmons v. United States*, 390 U.S. 377 (1968) (defendant's testimony at suppression hearing barred from use at trial). See also *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978) (testimony given to assert Speech and Debate Clause defense); *United States v. Immon*, 568 F.2d 326 (3d Cir. 1977) (testimony given to assert Double Jeopardy Clause defense).

However, a court cannot determine whether any constitutional provision requires a judicial grant of use immunity without assessing the implications upon the Executive Branch, both those that flow from a grant of use immunity and those that flow from an adjudication of whether such immunity might be appropriate in a par-

ticular case. The concerns previously expressed about the risk to other successful prosecutions are matters normally better assessed by prosecutors than by judges. Surely a court is in no position to weigh the public interest in the comparative worth of prosecuting a defendant or his witness, although if a court decides that immunity is required, it can always leave that ultimate assessment with the prosecutor by advising that trial of the defendant will continue only if the witness's testimony is immunized. But confronting the prosecutor with a choice between terminating prosecution of the defendant or jeopardizing prosecution of the witness is not a task congenial to the judicial function.[4]

Still it may be contended, as Judge Garth did in *Smith*, that a court ought to determine in each case whether the risks to the public interest in conferring defense witness immunity outweigh the needs of the defendant. *Smith* suggests two types of inquiry: whether the prosecutor's opposition to defense witness immunity stems from "the

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[4] We do not regard the limited immunity judicially created for the defendant in *Simmons v. United States, supra,* to be analogous to use immunity for a witness. In *Simmons* the Supreme Court ruled that a defendant's testimony at a suppression hearing, presented to establish satnding to assert a Fourth Amendment claim, could not be introduced at trial. The Court focused on exclusion of the defendant's testimony, and did not mention creation of formal use immunity, *i.e.*, prohibition against using testimony or any leads from it. Perhaps that was the implicit result of the decision, but, even if so, immunization of a statement concerning Fourth Amendment standing carries very little risk of impeding prosecution of the defendant for the substantive offense. Furthermore, *Simmons* creates an immunity to avoid the dilemma of a defendant's choosing between vindicating his Fourth Amendment right or maintaining his self-incrimination privilege at trial. Nothing comparable is presented when a defendant finds that evidence he hoped to present is unavailable because other persons prefer to assert their own privilege.

deliberate intention of distorting the fact finding process," —— F.2d ——, or whether the prosecutor can present "strong countervailing interest," *id.* at ——, to the defendant's need for clearly exculpatory evidence. Either inquiry will propel a trial court into uncharted waters. Focusing upon the prosecutor's intent will often lead to exploration and premature disclosure of the pending status of an investigation against the witness. Moreover, a prosecutor without enough evidence to seek indictment of a witness may legitimately prefer to maintain his option to prosecute on the basis of later information. It cannot fairly be argued, where the prosecutor declines to consent to use immunity, that the absence of present intention to prosecute is evidence of intention to distort the fact-finding process. Alternatively, weighing the "countervailing interest" in not granting defense witness immunity will in all likelihood prove to be as elusive a task as formulating any meaningful standards for the assessment. In the extraordinary fact situation presented by the *Smith* case, where the prosecutor opposing use immunity does not even have jurisdiction to prosecute the witness, the public interest in not granting defense witness immunity appears to be non-existent. But in most situations where defense witness immunity is likely to be sought, some legitimate opposing prosecution interest will exist, and constitutional fairness is not a satisfactory standard against which to assess such interests.

When any novel legal proposition is urged upon a court, there is a natural judicial reluctance to say "never." Indeed, the extraordinary fact situation presented by the *Smith* case illustrates a situation where denial of defense witness immunity can be said to deny the defendant the fair trial guaranteed by the Due Process Clause. Yet it is important to recognize that *Smith* really does not involve a use of the Due Process Clause to balance the public interest in withholding im-

munity against the defense need for it. In *Smith* the prosecutor with jurisdiction over the witness was willing to grant use immunity. Opposition came from a prosecutor without jurisdiction. This was simply an instance of a prosecutor interfering, for no apparent reason, to suppress evidence that was about to become available to the accused. We have no dispute with the holding in *Smith*. However, in light of all the considerations previously discussed, we find ourselves in fundamental disagreement with the standards outlined in that decision. Without precluding the possibility of some circumstances not now anticipated, we simply do not find in the Due Process Clause a general requirement that defense witness immunity must be ordered whenever it sems fair to grant it. Th essential fairness required by the Fifth Amendment guards the defendant against over-reaching by the prosecutor, *Giglio v. United States*, 405 U.S. 150 (1972) (failure to disclose promise not to prosecute government witness); *Waley v. Johnston*, 316 U.S. 101 (1942) (threat to use manufactured evidence); *Taylor v. Lombard*, 606 F.2d 371 (2d Cir. 1979) (knowing use of perjured testimony); *United States v. Westbo*, 576 F.2d 285 (10th Cir. 1978) (disobedience of court ruling excluding admission of other crimes evidence); *cf. Santobello v. New York*, 404 U.S. 257 (1971) (repudiation of plea bargain promise), and insulates him against prejudice. See, *e.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (judge had pecuniary interest in result); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (trial subject to excessive publicity); *Turner v. Louisiana*, 379 U.S. 466 (1965) (prosecution witnesses present in jury room during deliberations); *In re Murchison*, 349 U.S. 133 (1955) (judge also served as one-person grand jury); *Moore v. Dempsey*, 261 U.S. 86 (1923) (trial occurred under threat of mob violence). It does not create general obligations for prosecutors or courts to obtain evidence protected by lawful privileges.

Appendix A

The circumstances of this case do not remotely approach a situation where lack of defense witness immunity could be found to deny constitutionally protected fairness. In the first place, the demand for immunity was initially made in the middle of the trial and properly found to be untimely by Judge Broderick for reasons set out in the margin.[5] See *United States v. Taylor*, 562 F.2d

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[5] Judge Broderick's detailed findings were as follows:

Some 171 days elapsed between the first pre-trial conference herein and the beginning of trial. Defendants were aware that the government's investigation of the crude oil market was continuing during this period; this very fact was argued to me by defense counsel in seeking a substantial adjournment of the original date. Yet it was never drawn to my attention during this period that defendants had any intention of requesting immunization of witnesses. The crude oil investigation was initiated in the New York County District Attorney's office, and the investigation was conducted by Assistant District Attorney Michael F. Baumeister of that office and by Assistant United States Attorney Paul Vizcarrondo for the United States Attorney. These two men jointly represented the government in all pre-trial proceedings in this case, and they jointly presented the government's case at trial. The case was a complicated one, involving the complex organization and operations of the commodities futures market. Once trial began the full time of the two government attorneys, Baumeister and Vizcarrondo, was fully absorbed with the presentation of the case in the trial room.

The demand that witnesses be immunized was made at the close of the government's case, in the middle of the trial, when neither of the men in charge of the investigation was in a position—because of their trial duties—either to make a meaningful recommendation to the United States attorney that the testimony requested might be necessary to the public interest, or to shoulder the 'heavy burden' (*Kastigar v. United States*, 406 U.S. 441, 461 (1972)) of marshalling the evidence then available with respect to any of the proposed witnesses whom the government might indict in the future.

[Footnote continued on following page]

1345, 1361 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977); *United States v. Jones*, 487 F.2d 1308, 1311 (7th Cir.), *cert. denied*, 409 U.S. 858 (1972). Secondly, Judge Broderick carefully considered the expected testimony of the witnesses sought to be immunized and concluded that none of them would provide material, exculpatory evidence. Their testimony would either have been cumulative, immaterial, or impeaching only on collateral matters. Thus, the trial court's refusal to order the prosecutor to confer use immunity was plainly correct.

We have expressed our thoughts on the issue at some length because we do not agree with Judge Broderick's views on the general availability of defense witness immunity, nor do we wish to see criminal trials regularly interrupted by wide-ranging inquiries concerning the specific pros and cons of defense witness immunity in a particular case. In fact, we think trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution. No hearing should be held to establish such status. The prosecutor

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The resourcefulness of defense counsel at trial, and their thorough knowledge and understanding of the case, persuade me that they should have been able to anticipate that many prospective witnesses would invoke the Fifth Amendment, and in my judgment they should have presented to the prosecutors and to myself prior to trial the substance if not the details of the applications made at the close of the government's case.

Thus the applications by defendants were not timely. The effects of their untimeliness were to introduce the element of double jeopardy into a situation where it did not belong; and to force the government to consider their applications for immunity to 17 persons involved in an investigation at a time when the two government attorneys with the requisite knowledge were engaged on a full time basis in the presentation of a complex case on trial.

— F. Supp. at —.

need only show that the witness has been indicted or present to the court *in camera* an *ex parte* affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness's criminal activity. No duty is imposed upon the prosecutor; he simply has an option to rely upon the witness's status as an actual or potential target of prosecution to foreclose any inquiry concerning immunity for that witness. If a case should arise where the witness is not an indicted defendant and the prosecutor cannot or prefers not to present any claim that the witness is a potential defendant, and if the defendant on trial demonstrates that the witness's testimony will clearly be material, exculpatory, and not cumulative, it will be time enough to decide whether in those circumstances a court has any proper role with respect to defense witness immunity. Of course, our limited interpretation of the Fifth Amendment's application to this issue does not preclude broader action by United States Attorneys under the existing authority of § 6002 nor legislative action to define circumstances in which defense witness immunity should be granted.

Affirmed.

LUMBARD, *Circuit Judge* (concurring in part, dissenting in part):

I concur in affirming the conviction. I dissent, however, from the observations in Judge Newman's opinion which imply that under certain circumstances the district court would be under the duty of inquiring into whether or not the prosecution should grant use immunity to a prospective defense witness. In my view it is not the proper business of the trial judge to inquire into the propriety of the prosecution's refusal to grant use immunity to a prospective witness.

Appendix A

In our adversary system the judge best performs his function by remaining completely impartial and objective and keeping entirely apart from the decisions which govern the conduct of the Government's case and the presentation of the defense. As Judge Newman's careful analysis shows, the continuing investigation and the unexpected development of evidence, and the willingness of co-conspirators to give evidence, all bear upon the difficult and delicate decisions which prosecutors must make in recommending indictments and in presenting evidence at trial. Even if it were possible for the judge to be sufficiently informed of all the pertinent facts and considerations—which he cannot be—it is highly undesirable that the judge should be asked to bear a burden that is fraught with the danger that his impartiality and objectivity may seem to be, or may actually be, impaired. The judicial function exercised by the judge should not be confused with the executive function to determine how to prosecute defendants and present evidence against them. This important distinction between government functions, which has the firmest possible roots in the Constitution itself, is expressly recognized in the immunity statute. This statute places the decision to grant in the hand of the Department of Justice and they leave to the court only the ministerial function of granting the order and thus directing that the statute is observed.

I see nothing in theory, or in practice, to be gained by any procedure whereby the prosecutor may be called upon to state that he has reason to believe that the intended witness is a possible defendant. Theoretically, the response of the prosecutor is simply that his refusal to agree to use immunity is justified by the mere claim of the witness. The witness presumably knows more about his own involvement in the allegedly illegal activities of the defendant. Consequently, the government cannot be expected to forego the unrestricted use of the witness' testi-

mony, and cannot be required to undergo the difficulty of managing separate staffs to ensure compliance with a restriction that no use may be made of what the witness might say.

It is not difficult to see what will happen if we suggest that trial judges should examine claims of defendants that use immunity should be granted to prospective witnesses who otherwise would refuse to testify under the Fifth Amendment. Let us suppose the prosecutor has indicted five defendants. Each one could claim that one or more of his co-defendants would, if granted use immunity, give testimony favorable to his defense. There would then be five separate trials, as it would be difficult for the judge to find that the defendant's claim is groundless. To prosecute five separate trials the prosecutor's office would have to create five separate and completely different staffs of attorneys to insulate the prosecutor from any later claim that some use had in fact been made of testimony given by the defendant when he was a witness for a co-defendant at an earlier trial.

In many cases the witness will assert that his lawyer really cannot know whether the witness (who may think himself to be an innocent bystander) might, short of immunity, be providing a missing link in the chain of circumstantial evidence. The prosecution can then ask that the proposed witness be examined by counsel, *in camera* and under oath, to determine whether there is in fact a good faith assertion that the witness' testimony may tend to incriminate him. The knee-jerk use of the Fifth Amendment by witnesses is usually a device to avoid the unpleasant and embarrassing experience of testifying against a friend or someone whose retaliation is feared. Although everyone knows this, the claim of the Fifth Amendment privilege is hardly ever questioned even when witnesses use it to avoid stating their address or occupation or whether they know a person.

Thus, if we are to open the door to collateral proceedings to determine the propriety of the prosecution's refusal to give use immunity to intended witnesses, the district courts should also be prepared to spend some time inquiring into the good faith of Fifth Amendment claims which are made as a ploy to get use immunity, or, if use immunity is denied, to use the denial as a ground for appeal after conviction. The prosecutor's request for such a hearing to test the good faith of the claim would surely be entitled to as much consideration as would be the demand for use immunity because experience teaches that it is far more likely than not that there is no basis for the claim.

In sum, I do not see how the prosecutor's refusal to grant use immunity to a witness, who suggests by his claim of immunity that he might well be a suitable target for investigation, can ever be considered improper interference with the production of evidence.

Every unnecessary disclosure of information by the prosecution increases the difficulties of administering criminal justice: whether or not the prosecutor has any evidence about the potential witness is information which may be of value to the witness. A prosecutor may have an indication not rising to the level of admissible evidence or even to the point where it could be considered "persuasive" (albeit inadmissible) by a trial judge. If the judge rejects the *ex parte* submission of the prosecutor, then the potential witness may be relatively certain that his activities are undiscovered. Clearly such a procedure may have great value to the wrongdoer.

Indeed, by suggesting that there may be cases where the court should inquire of the prosecution about use immunity, we invite wrongdoers to come forward as potential witnesses to ascertain if they have been discovered. It is apparent that the district courts may expect an in-

creasing number of applications for use immunity inquiries.

Moreover, the requirement that some record be made of the prosecutor's response presents obvious dangers. Such material which may be of great value to the wrongdoer-potential witness will necessarily be disclosed to others beyond those who need to know—a typist, a clerk, a reporter or other aide.

For these reasons, I conclude that the potential harm to the administration of criminal justice which is involved in any inquiry into the grant of use immunity to a witness so far outweighs any possible need for such a procedure to ensure fair trials, that I would prohibit the district court from entertaining such an application or conducting such an inquiry.

APPENDIX B

Memorandum Decision of Broderick, D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Crim. 251 (VLB)

UNITED STATES OF AMERICA,

—against—

NORMAN TURKISH and MICHAEL KELLOGG,
Defendants.

This is a copy of a memorandum filed herein under seal. This copy is to be filed. The copy conforms to the memorandum filed under seal, except that certain names have been redacted at the request of counsel.

SO ORDERED.

VINCENT L. BRODERICK, U.S.D.J.

Dated: October 19, 1979

Appendix B—Memorandum Decision of Broderick, D.J.

I.

Norman Turkish and Michael Kellogg ("the defendants") were convicted after trial of conspiracy to defraud the United States by creating fraudulent tax losses on behalf of an oil company, C. R. Rittenberry & Associates, Inc. ("Rittenberry"), through fixed, rigged and prearranged commodity futures transactions on the crude oil market of the New York Cotton Exchange.[1] Mr. Turkish was also convicted of two counts of individual income tax evasion and two counts of filing false individual income tax returns.

The trial was originally scheduled to begin on July 5, 1978. Defense counsel sought adjournment of the trial date, urging the complexity of the operations of the commodities futures market, and the volume of materials which had to be inspected and analyzed in preparation for trial. They also noted that the pendency of a continuing investigation by the government made prospective witnesses reluctant to speak to defense counsel. I found that the interests of justice would be served by a delay in the starting date of the trial, and it was finally commenced some three months later, on October 12, 1978. No application was made at any time prior to trial for the immunization of any prospective defense witnesses.

During the trial, after the conclusion of the government's case, the defense counsel informed the court that several prospective witnesses for the defense would assert their Fifth Amendment privilege[2] and decline to testify.[3]

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[1] Four defendants were charged in the conspiracy count. Two defendants, Frank Knell and Donald B. Conlin, were acquitted.

[2] Amendment V

"No person shall . . . be compelled in any criminal case to be a witness against himself. . . ."

[3] Subsequently, in accordance with a procedure stipulated to by the parties and approved by me, the attorneys for the witnesses represented in court or by affidavit that their respective clients would indeed assert their Fifth Amendment privileges.

Defense counsel asserted that the testimony of these witnesses would exculpate the defendants and thus was vital to their defense.[4] Most of the prospective witnesses were involved in trading commodities on the crude oil market, and in some instances they had close ties to the defendants or Rittenberry. It was represented that the witnesses would assert their Fifth Amendment privilege because of concern over the ongoing investigation by the government into commodities trading on the crude oil market. Defendants moved that the proposed defense witnesses be required to testify pursuant to 18 U.S.C. §§ 6002 and 6003,[5] the so-called "use immunity" provi-

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[4] The defendants submitted to me affidavits delineating the questions which would be posed to the witnesses and the expected responses. The significance and sufficiency of the expected testimony is discussed *infra* in Section VI.

[5] 18 U.S.C. §§ 6002, 6003:

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any

[Footnote continued on following page]

sions. Under these provisions the court, upon the request of the United States attorney, must issue an order compelling a witness to testify, and neither the testimony he gives nor any information derived therefrom may be used against him. A grant of immunity under 18 U.S.C. § 6002 and 6003 overcomes a Fifth Amendment privilege. *Kastigar v. United States*, 406 U.S. 441 (1972). Defendants based their motions upon the compulsory process clause of the Sixth Amendment[6] and the Due Process clause of the Fifth Amendment.[7]

Defendants asked that the indictment against defendants be dismissed if the government refused to make the

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proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

[6] Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, . . ."

[7] Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .:"

statutory request (and thus refused to consent to the grant of immunity). After hearing argument on defendants' motions and receiving affidavits in support thereof, I invited the government to consider whether the United States attorney would consent to the grant of immunity. After considering the matter, government counsel informed me that he would not consent. I then reserved decision until the conclusion of the trial,[8] and I have received post-trial memoranda of law from the defendants and the government. In their post-trial memoranda the defendants seek a judgment of acquittal or a new trial.

II.

By order dated August 23, 1979 I denied defendants' motions. This memorandum sets forth the reasons for that denial.

III.

Prior to 1970 immunity statutes generally granted complete transactional immunity (the immunized witness could not be prosecuted with respect to any transaction he testified about). In 1970 18 U.S.C. §§ 6002 and 6003 were enacted, providing a more restricted degree of immunity: the immunized witness is still liable to prosecution with respect to a transaction he testifies about, but neither his testimony, nor any information derived from that testimony, may be used in such a prosecution. In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court upheld the constitutionality

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[8] I reserved decision until the conclusion of trial because 1) a verdict of acquittal by the jury would have rendered the issue moot; and 2) since jeopardy had attached and a mistrial was not sought by defendants, the only remedy available during trial, dismissal of the indictment, was in my judgment not equitable.

of compelling a witness to testify under the limited use immunity grant of 18 U.S.C. §§ 6002 and 6003.

18 U.S.C. §§ 6002 and 6003 were obviously designed by Congress to serve as an aid to law enforcement by making it possible for the government to derive testimony from a witness despite his invocation of the Fifth Amendment without immunizing him from future prosecution in connection with the transaction he is to testify about. Under 18 U.S.C. §§ 6002 and 6003 a request by the United States attorney is prerequisite to the grant of immunity to a witness, and the granting of immunity is mandated if a proper request is made. The United States attorney may make a request for the grant of immunity (after securing appropriate authority within the Justice Department) if the witness has invoked, or is likely to invoke, his Fifth Amendment privilege, and if in the judgment of the United States attorney the testimony "may be necessary to the public interest."

Nothing in 18 U.S.C. §§ 6002 and 6003 authorizes the grant of use immunity at the behest of a defendant, and nothing prohibits it. Congress could, of course, have authorized the grant of use immunity at the request of a defendant, or upon a certain showing by a defendant, but it did not. For a defendant to secure use immunity under the statute his attorney would have to persuade the United States attorney that the testimony "may be necessary to the public interest," and that he should request it.

Prior to the enactment of 18 U.S.C. §§ 6002 and 6003 many courts considered the question of whether defendants were entitled to have prospective defense witnesses who invoked the Fifth Amendment immunized, and they uniformly held they were not. *E.g. Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967); *United States v. Lyon*, 397 F.2d 505, 512-13 (7th

Cir.), *cert. denied*, 393 U.S. 846 (1968). Courts which have considered the matter since enactment, and since the Supreme Court's opinion in *Kastigar v. United States*, *supra*, have for the most part continued to hold that under the circumstances there presented immunization was not available—without ruling out the possibility that under appropriate circumstances it might be. *E.g. United States v. Niederberger*, 580 F.2d 63 (3d Cir. 1978); *United States v. Carmon*, 577 F.2d 556, 561 (9th Cir. 1978).

The government can preserve its right and power to prosecute a witness, with respect to a transaction as to which he is required to testify at the request of the United States attorney under 18 U.S.C. §§ 6002 and 6003, by making a record prior to his testimony of the evidence in its possession (which record will establish that the evidence is not derived from the immunized witness' testimony). The Supreme Court has noted that this is a heavy burden:

> A person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in *Murphy*:
>
> > "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U.S., at 79 n.18.
>
> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather,

> it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

Kastigar v. United States, 406 U.S. 441, at 460 (1972). The government could, certainly in theory, make a similar record with respect to a witness who was immunized at the request of a defendant under 18 U.S.C. §§ 6002 and 6003.

IV.

Since the statute does not authorize the granting of immunity to a defense witness absent the request of the United States attorney predicated upon his judgment that the testimony "may be necessary to the public interest," the only basis upon which this court can act is upon the Sixth Amendment, or the Due Process clause of the Fifth Amendment. A district court has no inherent power to grant immunity.[9] If the court finds that denial of consent would deprive the defendant of his constitutional right to a fair trial, it can give the prosecutor the choice of requesting (or consenting to) the grant of im-

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[9] *See United States v. Lang*, No. 78-1205, slip. op. at 468 (November 30, 1978), *quoting Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 368 U.S. 921 (1967); ("This power [to grant immunity] . . . is not inherent in the judiciary."); *United States v. Niederberger*, 530 F.2d 63, 67 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978); ("[A] trial court has no authority to provide use immunity for a defense witness."); *United States v. Hausand*, 550 F.2d 818, 824 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977) ("Once the trial judge determines that the claim of privilege is proper, however, he cannot himself confer immunity, for Congress has limited the power to grant immunity—in the face of a valid claim of privilege—to a limited group of federal officials who may apply to the court to compel the witness to testify under immunity.").

munity or suffering a dismissal. *Cf. Roviaro v. United States*, 353 U.S. 53, 61 (1957) ("The trial court may require disclosure [of informer's identity] and, if the Government withholds the information, dismiss the action.").[10]

In Section V, *infra*, I consider the applicability of the Sixth Amendment compulsory process provisions to defendants' claims, and in Section VI, *infra*, I consider the merits of their claims under the Fifth Amendment. Under both the Fifth and Sixth Amendments I find that their applications were untimely, and on that basis must be dismissed.

Some 171 days elapsed between the first pre-trial conference herein and the beginning of trial. Defendants were aware that the government's investigation of the crude oil market was continuing during this period; this very fact was argued to me by defense counsel in seeking a substantial adjournment of the original trial date. Yet it was never drawn to my attention during this period that defendants had any intention of requesting immunization of witnesses. The crude oil investigation was initiated in the New York County District Attorney's office, and the investigation was conducted by Assistant District Attorney Michael F. Baumeister of that office [11] and by Assistant United States Attorney Paul Vizcarrondo for the United States Attorney. These two men

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[10] Here where the application for immunization was made not prior to trial but during the course of the trial, and decision was reserved until after the trial, the appropriate remedy, if relief were to be granted, would seem to be the declaration of a mistrial —relief which is within the ambit of defendants' post-trial applications.

[11] Assistant District Attorney Baumeister was appointed a special assistant United States attorney for purposes of representing the government at pre-trial proceedings herein and at trial.

jointly represented the government in all pre-trial proceedings in this case, and they jointly presented the government's case at trial. The case was a complicated one, involving the complex organization and operations of the commodities futures market. Once trial began the full time of the two government attorneys, Baumeister and Vizcarrondo, was fully absorbed with the presentation of the case in the trial room.

The demand that witnesses be immunized was made at the close of the government's case, in the middle of the trial, when neither of the men in charge of the investigation was in a position—because of their trial duties—either to make a meaningful recommendation to the United States attorney that the testimony requested might be necessary to the public interest, or to shoulder the "heavy burden" (*Kastigar v. United States*, 406 U.S. 441, 461 (1972) of marshalling the evidence then available with respect to any of the proposed witnesses whom the government might indict in the future.

The resourcefulness of defense counsel at trial, and their thorough knowledge and understanding of the case, persuade me that they should have been able to anticipate that many prospective witnesses would invoke the Fifth Amendment, and in my judgment they should have presented to the prosecutors and to myself prior to trial the substance if not the details of the applications made at the close of the government's case.

Thus the applications by defendants were not timely. The effects of their untimeliness were to introduce the element of double jeopardy into a situation where it did not belong; and to force the government to consider their applications for immunity to 17 persons involved in an investigation at a time when the two government attorneys with the requisite knowledge were engaged on a full time basis in the presentation of a complex case on trial.

V.

Historically the Sixth Amendment right to compulsory process was designed to enable a defendant to require a witness in his or her favor to be physically present in court. It has not, historically, enabled the defendant to require the witness to testify. Thus, for example, the witness' Fifth Amendment right not to incriminate himself could intervene. *Note, The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses,* 91 Harv. L. Rev. 1266, 1267 n. 8 (1978). In recent years the reach of the Sixth Amendment has been extended to protect a defendant from government interference, either by statute or by act, with the presentation of the testimony of his compelled witnesses.

In *Washington v. Texas,* 388 U.S 14 (1967), it was held that, at least under the circumstances there presented, the Sixth Amendment could be invoked (through the Due Process clause of the Fourteenth Amendment) not only to compel the physical presence of a witness for a criminal defendant in state court, but also to enforce the right to put the witness on the stand to present a defense. The Court held that a state cannot prevent defense witnesses from testifying "by arbitrary rules." It declared unconstitutional under the Sixth Amendment Texas statutes which, by providing that persons charged or convicted as coparticipants in the same crime could not testify for one another, affirmatively prevented presentation of witnesses in favor of the accused.[12]

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[12] The Texas statutes declared unconstitutional in *Washington v. Texas,* permitted the charged or convicted coparticipant to testify for the government. The Court did not discuss this facet in reaching its conclusion under the Sixth Amendment, probably because the discrepancy in potential use—*i.e.,* the government may use the witnesses while defendant may not—is actually an issue

[Footnote continued on following page]

Similarly, where it is the affirmative conduct of the government rather than a statute which prevents defense witnesses from testifying, defendants' Sixth Amendment rights may be violated, and "due process may demand that the government request use immunity for a defendant's witness." *See United States* v. *Morrison*, 535 F.2d 233, 229 (3d Cir. 1976) (prosecutor brought pressure on prospective witness not to testify by, *inter alia*, subpoenaing her to his office and, in the presence of three law enforcement officers, "impress[ing her] with the force of the law with with [sic] she was entangling.").

There was no statute here, as in *Washington* v. *Texas*, *supra*, which prohibited the use by defendants of any witnesses. Their testimony was indeed foreclosed—but only by the independent decision of the proposed witnesses themselves to avail themselves of their Fifth Amendment privileges.[13] Nor was there here, as in *United States* v. *Morrison*, *supra*, any affirmative act by the government which was designed to prevent defense witnesses from testifying. The only affirmative act which defendants charge to the government is an ongoing government investigation which "causes virtually every potential defense witness to invoke his privilege."[14] From this defendants ask me to conclude that "affirmative

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of Fifth Amendment due process. If the Court had not found that a Sixth Amendment right existed, it might then have reached the Fifth Amendment question and considered whether the fact that the government could present the witnesses while the defendant could not violated the defendant's Fifth Amendment due process rights.

[13] At least two of these proposed witnesses were under state court indictment in connection with activities in the crude oil market.

[14] Defendant Turkish's Post-Trial Memorandum ("Defendants' Memo"), at p. 25. Defendant Kellogg, by letter from counsel dated February 13, 1979, joins in defendant Turkish's Post-Trial Memorandum.

Government conduct prevented the defendant[s] from presenting exculpatory testimony. . . ." [15]

I find otherwise. This is not the kind of improper or arbitrary governmental conduct which violates the Sixth Amendment under *Washington v. Texas, supra* and *United States v. Morrison, supra.* The investigatory freedom of the executive is too important, and the causal nexus between the ongoing investigation and the compulsory process problems too attenuated, for me to find that defendants' Sixth Amendment rights have been violated. One of the functions and obligations of the government is to investigate crime. The return of an indictment does not terminate the government's obligation to investigate crime in any particular area and under basic principles of separation of powers it is not the appropriate providence of the court to call "halt" at any particular point to the government's investigative activities. If, of course, facts are brought to the court's attention which indicate that the investigative function of the government is being improperly exercised, as for the purpose of preventing a fair trial (*see Morrison v. United States, supra*) rather than that of detecting crime then, and only then, would it be proper for the court to intervene. No facts have been brought to my attention to indicate any such improper exercise of the government's investigative function.

The applications are denied to the extent that they are based on the Sixth Amendment. No action was taken by the court, or by the government (save the perfectly appropriate action of continuing an unfinished investigation), to interfere with process, and the Fifth Amendment rights of witnesses have always constituted limitations on the untrammeled reach of the Sixth Amendment compulsory process rights of defendants.

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[15] *Id.* at p. 45.

VI.

In the context of criminal trial the Fifth Amendment [16] requires that the defendant be afforded fundamental fairness, taking into account all of the circumstances. *Pinedo v. United States*, 347 F.2d 142 (9th Cir. 1965), *cert denied*, 382 U.S. 976 (1966). Determining issues of due process in any given case necessitates consideration and balancing of the factors of the private interest involved and risk of deprivation of due process under present procedures compared with the probable value of the suggested procedure, and the government interest. The court must consider whether the government's refusal to request, or consent to, the immunization of defense witnesses on the application of defendants, at the time and in the context in which those applications were made, resulted in defendants' being denied a fair trial because they were not able to offer the testimony of witnesses on their behalf on material issues. In Section IV, *supra*, I have dealt with the question of time and context. In this section I consider substantive questions of unfairness.

On the government interest side of the Due Process balance, the government raises the spectre of an "immunity bath" to persons under investigation if immunity is granted. The danger of an "immunity bath" is not, of course, inherent in a grant of immunity, and can be obviated by restricting the questions which may be posed to the witness to those which are relevant and necessary to the case at bar by carefully narrow phrasing of the questions, and by denying immunity with respect to answers which are not responsive. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972) (upholding constitutionality of immunity only

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[16] *See* note 7, *supra*.

for nonresponsive answers). *See generally Right of the Criminal Defendant to the Compelled Testimony of Witnesses,* 67 Col. L. Rev. 953, 961 (1967).

Many cases relied upon by the government, which held that the government never has to choose between a grant of immunity or dismissal, were decided prior to the decision of the Supreme Court in *Kastigar v. United States, supra.*[17] As already noted, prior to *Kastigar* most grants of immunity were transactional, and the government could not thereafter prosecute a witness testifying under immunity with respect to any transaction referred to in his or her testimony. Transactional immunity thus severely restricted the law enforcement function of the government.

After *Kastigar, supra,* a witness who testifies under a grant of use immunity may be prosecuted thereafter, with respect to transactions he testifies about, on the basis of evidence which the prosecutor has independently obtained.[18] Thus under use immunity the government's law enforcement function at least theoretically retains vitality:

> The prosecution surrenders nothing by granting it [use immunity]: The incriminating statements that it cannot use against the immunized witness are statements that, absent immunity, would never have been made. The prosecution can hardly complain about immunizing defense witnesses because, as the Supreme Court said [in *Kastigar v. United States,* 406 U.S. at 462] the prosecution is

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[17] *See e.g., Earl v. United States,* 361 F.2d 531 (D.C. Cir. 1966).

[18] The great majority of post-*Kastigar* cases merely cite to pre-*Kastigar* cases, or do not discuss the impact of *Kastigar* upon the due process analysis.

> in *substantially the same position* with respect to a witness after granting him immunity as before.

Western, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71 (hereafter *"Western"*) at 169 (1974). See *Kastigar v. United States, supra*, at 462 ("We conclude that the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege.") The government will have the "heavy burden," of course, of proving an independent source for evidence subsequently used against a witness who testifies under a grant of use immunity. This will require the government to catalogue and verify the evidence in its possession prior to the time the witness testifies, and to establish independent sources for evidence obtained thereafter. Depending on the circumstances these may or may not prove to be manageable tasks. *See, e.g.*, the procedure for court certification of government evidence suggested in *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli*, 82 Yale L. J. 171, 181 *et seq.* (1972-1973).[19]

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[19] The practice of granting immunity to defense witnesses involves additional potential burdens for the government and potential abuses by defendants.

Thus co-defendants in a conspiracy trial may all assert a need for the others' allegedly exculpatory testimony. However, the Supreme Court in *Bruton v. United States*, 391 U.S. 123 (1968) has already determined that the efficiency of a joint trial must give way to legitimate rights of the defendants. *See Note, The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 Harv. L. Rev. 1266 (hereafter *"Note, Sixth Amendment Right"*) at 1275-76 (1978).

A defense witness may perjure himself or herself in order to exculpate the defendant and then try to shield himself or herself behind the grant of immunity. However, credibility has always been an issue to be argued before and determined by the

[Footnote continued on following page]

Appendix B—Memorandum Decision of Broderick, D.J.

In support of their interests in the Due Process balance, defendants rely most heavily upon *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), in which the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Defendants seek to require, on the principles of *Brady*, that the government consent to the granting of use immunity to witnesses whose testimony may be useful to the defendants.

By analogy to *Brady*, due process probably requires that where a defendant makes a sufficient and timely showing

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jury; the Supreme Court has determined that statutes which are fashioned to prevent perjury must yield to defendants' Fifth and Sixth Amendment rights. *Brooks v. Tennessee*, 406 U.S. 605 (1972) and *Washington v. Texas*, 388 U.S. 14 (1967), discussed at *"The Public Has a Claim to Every Man's Evidence: The Defendant's Constitutional Right to Witness Immunity*, 30 Stan. L. Rev. 1211 (1978) (hereafter *"Defendant's Constitutional Right"*) at 1237-1238 and n.121, 122. *See also Note, Sixth Amendment Right, supra* at 1273, n.48; *Note, Separation of Powers and Defense Witness Immunity*, 66 Geo. L. J. 51 (1977) (hereafter, "Note, Separation of Powers").

If a mistrial is declared in a given case because the government has refused to grant immunity, it is possible that at a second trial the defendants may ultimately decide not to call the witness in question. Similarly, when the government agrees to grant immunity to a defense witness at a pre-trial stage, the defendant may ultimately decide not to call the witness at trial. A ruling that the defendant is entitled to have his or her witness immunized should certainly not be conditioned upon a commitment to call the witness. The defendant may receive information after the immunity grant which indicates that it is not to defendant's advantage to call the witness and this information may have been unavailable from the witness before the decision to grant immunity. This latter problem could be dealt with by reserving the actual grant of immunity—as contrasted with the decision to grant it—until the moment before the witness testifies.

of need for the testimony of a witness who invokes his or her Fifth Amendment privilege, the government must grant immunity to the witness or suffer dismissal or mistrial. *United States v. De Palma*, No. 78-401, slip op. (S.D.N.Y. Aug. 15, 1979).[20] *See "The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity*, 30 Stan. L. Rev. 1211 (1978) (hereafter *"Defendant's Constitutional Right"*); Westen, *supra* at 166-170; *Note, A Re-examination of Defense Witness Immunity: A New Use for Kastigar*, 10 Harv. J. Legis. 74 (1972). *See also* statements by Chief Judge Bazelon in *United States v. Gaither*, 539 F.2d 753, 753-55 (D.C. Cir.), *cert. denied*, 429 U.S. 961 (1976) (on denial of petition for rehearing en banc); *United States v. Leonard*, 494 F.2d 955, 985 n.79 (D.C. Cir. 1974) (concurring in part and dissenting in part) (dictum) (above cases cited at 30 Stan. L. Rev. 1211, 1213 n.12 (1978)).[21]

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[20] In *De Palma* a request was made prior to trial for immunity to be granted to two proposed defense witnesses. Judge Sweet after trial found that the request was timely, that the proposed testimony would be material, and he ordered a new trial. While I would differ with his reliance upon the government's use of the immunity power with respect to its own witnesses as a significant factor, the same result would undoubtedly have been reached on the Due Process analysis herein.

[21] The government argues that it must grant immunity to a defense witness only if the court finds that the government "acted 'with the deliberate intention of distorting the judicial fact finding process'". Government Memo. at 22, *quoting, United States* v. *Herman*, Nos. 78-1252, -1282, slip. op. at 22 (3rd Cir. November 17, 1978). However, the Supreme Court, in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) explicitly stated, in the context of "suppression by the prosecution of [material] evidence favorable to an accused upon request," that due process is violated "irrespective of the good faith or bad faith of the prosecution." *See also United States ex rel. Meers v. Wilkins*, 326 F.2d 135, 139 (2d Cir. 1964).

The role of the court is to determine whether a defendant has established a due process need for the testimony by showing that the testimony meets a threshold standard of materiality.[22] The materiality threshold is met if "the defendant shows that the testimony of a witness claiming the fifth amendment *could reasonably affect the outcome of the case*, and if the defense has no alternate source for the identical evidence. . . ." *Defendant's Constitutional Right, supra* at 1235-36 (footnote omitted). Relevant factors are whether the testimony sought by defendants is cumulative, *United States* v. *Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976) ("We are not convinced that appellant was denied a fair trial in this case. The testimony sought by appellant was cumulative of the testimony of other witnesses."), and whether the testimony likely to be elicited from the witness is not exculpatory but might "[establish] the Government's case." *United States* v. *Lang*, 589 F.2d 92, 96 (2d Cir. 1978).

Defendants have urged as significant in due process analysis that the government informally granted what was effectively transactional immunity to various of its own witnesses during the course of the trial—notably Joseph Hamilton and his son—and that use immunity was conferred under 18 U.S.C. §§ 6002 and 6003 upon one government witness. In *Earl* v. *United States, supra* at 534 n.1, the court regarded such one-sided use of the immunity power as significant, and many courts, both before and since *Earl*, have agreed. *See, e.g. United States* v. *Lang, supra* at 96, n.1; *United States* v. *De*

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[22] A requirement that the evidence sought is material exists under both *Brady v. Maryland*, 373 U.S. 83 (1963), *see United States* v. *Agurs*, 427 U.S. 97, 104-107 (1976), and *Roviaro* v. *United States*, 353 U.S. 53 (1957), *see United States* v. *Morell*, 524 F.2d 550, 557 (2d Cir. 1975), discussed in *Note, Separation of Powers, supra* n. 16a, at 76-78 and n. 112, 113.

Appendix B—Memorandum Decision of Broderick, D.J.

Palma, et. al, No. 78-401, slip op. (S.D.N.Y. Aug. 15, 1979).

I am inclined, however, to regard the government's own use of immunity as irrelevant to the due process analysis. Due process requires fairness to a defendant; the defendant's need for the testimony is balanced against the hardship to the government. While it is true that the fundamental fairness of a trial is affected by the presence of the immunity power in the government's and not the defendant's arsenal, it is the availability and not the use of the power which creates the imbalance. If the government immunizes a witness and the defendant's important witnesses do not require immunity, the trial is not thereby rendered fundamentally unfair. Conversely, if the defendant's important witnesses do require immunity, the defendant should not be foreclosed from this right merely because the government chose not to exercise the power on its own behalf. *See Defendant's Constitutional Right, supra* n.16a at 1233 n.103; *Note, A Reexamination of Defense Witness Immunity: A New Use for Kastigar,* 10 Harv. J. Legis. 74, 78-79 (1972).

Defendants argue that they need not show that the testimony of their proposed witnesses would exculpate the defendants. I reject this argument. There must be an affirmative showing that the witnesses, if granted immunity, will offer testimony that is exculpatory. *Cf. Byrd* v. *Wainwright,* 423 F.2d 1017 (5th Cir. 1970), *cited in United States v. Sasso,* 78 F.R.D. 292, 294 (S.D.N.Y. 1977).

Defendants have submitted, through affidavits of counsel and in their Post-Trial Memoranda, synopses of the expected testimony of the seventeen proposed defense witnesses for whom grants of immunity have been re-

quested.[23] Defendants also set forth their position as to how the proposed witnesses' testimony relates to the issues

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[23] Defendants argue that their motion can be granted without a hearing on the exculpatory nature of the proposed testimony but cannot be denied without a hearing, because the government has submitted no proof for its assertion that the proposed testimony is not exculpatory. Therefore, argue defendants, their offer of proof "stands uncontradicted." (Defendants' Post-Trial Reply Memorandum at p. 8). I find that an evidentiary hearing is not necessary. Since the government has not rebutted defendants' representations as to the content of the proposed testimony, I evaluate the proposed witnesses' testimony as that testimony is predicted by defendants. Therefore, defendants are not prejudiced by the absence of an evidentiary hearing. The issue for determination is legal, not factual, *i.e.*, the application by me of the materiality requirement to the proposed testimony as set forth by defendants.

An alternative procedure would involve an *in camera* examination by me of the proposed witnesses. I would question the proposed witness as to his or her testimony and then decide whether the testimony meets the materiality standard. The record of my *in camera* examination of the witnesses would be sealed, available only to the appellate court upon appeal. This procedure has the advantage of concreteness—I would know what the proposed witnesses' testimony entails; I would not be relying upon necessarily sketchy predictions.

However, the flaw in this alternate procedure is that it in itself flies in the face of the witnesses' Fifth Amendment privilege. The proposed witness is likely to assert his or her Fifth Amendment privilege at the *in camera* hearing. *See Kastigar* v. *United States*, 406 U.S. 441, 444-45 (1972) ("[The Fifth Amendment privilege] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigative or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.") While the *in camera* examination would be sealed, there is always a danger that the secrecy protections would fail. Therefore, the witnesses could be compelled to give *in camera* testimony regarding their proposed testimony only with a grant of immunity, which is the ultimate

[Footnote continued on following page]

at trial and exculpates the defendants. The government has responded, asserting that the proposed evidence does not meet any materiality requirement. I shall consider the proposed testimony of each witnesss or group of similar witnesses, seriatim.[24]

Cotton Exchange Officials—Defendants wish to present the testimony of two officials[25] of the New York Cotton Exchange, the the body which encompasses and which developed and sponsored the crude oil market. Defendants assert that these two officials would testify as to the promotional efforts by the Cotton Exchange on behalf of the crude oil market, and as to their relationship with Joseph Hamilton in efforts to encourage trading

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relief sought herein and which I am not prepared to give. *See* n.14 *supra; Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 Col. L. Rev. 953 (1967) (hereinafter, "Compelled Testimony") at 975 *et seq.* and n. 128; *Note, Sixth Amendment Right, supra* n. 16a at 1274-75 and n. 60. *Contra Defendant's Constitutional Right, supra* n. 16a at 1238 *et seq.;* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 581 n. 38 (1977-78).

[24] The government correctly states in its Post-Trial Memo at p. 30 that the vice president of Rittenberry is the only witness for whom defendant Kellogg specifically requested immunity. However, defendant Kellogg, through his attorney, also "join[ed] in and adopt[ed] the written applications submitted by each of the codefendants." Letter to me from Walter J. Higgins, Jr., dated November 29, 1978. Therefore, the proposed testimony of all the witnesses discussed herein is considered as to defendants Turkish and Kellogg.

[25] Defense counsel have represented that they gave assurances to the attorneys for various of the prospective witnesses that the identity of the individuals would not be revealed in open court. The affidavits and memoranda identifying them were submitted under seal.

The original of this memorandum, in which those individuals are identified, is also to be sealed.

on the crude oil market. I find that the proposed evidence is not at all likely to affect the outcome of the case. It does not meet the materiality standard.

Defendants also wish to offer the testimony of one of these officials regarding a meeting which he attended at Bear Stearns in an effort to encourage Bear Stearns personnel to use the crude oil market. Although the government argues that testimony as to this meeting is available from another source, a Mr. Alan Greenberg, I accept the defendants' assertion that Mr. Greenberg could not testify because he has no recollection of the meeting. I find, however, that the proposed testimony regarding the meeting at Bear Stearns is cumulative of the testimony of others, *e.g.*, Donald B. Conlin and defendant Turkish [26] and moreover, is not material to the issues presented in the indictment.

Defendants' final argument as to this latter official is based upon a note which the jury sent to court during its deliberations. In its note, the jury asked whether it could draw any inference from the fact that he, among others, did not testify. The jury was instructed that it could draw no inference from this fact. Defendants argue that the jury's inquiry is dispositive proof that the testimony of the official is material; *i.e.* it may have affected the outcome of the case. I do not agree. In light of the exceptionally conscientious posture of this jury, I am confident that they followed my instruction. I reject the pro-

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[26] Defendants argue that the testimony sought should not be denied as cumulative where the testimony is cumulative only of testimony given by defendants, because the jury normally does not accord the same weight to testimony of defendants as it does to testimony of non-defendants. While I accept this argument in essence, the jury acquitted Donald Conlin and presumably found his testimony, at least, credible.

posed inference that testimony automatically is material because the jurors were curious as to its absence.[27]

Floor Brokers in Crude Oil—Defendants contend that three floor brokers would testify as to the common practice of setting trades and arranging for people to take the other sides of trades in the crude oil market. I find that this proposed testimony is cumulative and not material—it could not reasonably affect the outcome of the case.

Other Floor Brokers—I reach the same conclusion as to lack of materiality regarding the proposed common practice testimony of three other floor brokers.

Defendants also argue that four of the above floor brokers would contradict the testimony of Joseph Hamilton regarding his alleged money transfers with them. However, the testimony by Hamilton regarding money transfers with these individuals was brought out on cross-examination, and defendants may not now attempt to rebut it by extrinsic evidence. Rule 608(b), Fed.R.Evid.; *see United States v. Franzese*, 392 F.2d 954, 962 (2d Cir. 1968), *vacated per curiam on other grounds sub. nom. Giordano v. United States*, 394 U.S. 310 (1969); 3 J. Weinstein & M. Berger, Evidence ¶ 608[05] at p. 608-22 (1978).

Pressner Trading Corporation Customers — Defendants represent that various persons would testify that they

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[27] Defendants also argue that they are entitled to a new trial because I denied their request that I give a "missing witness" instruction to the effect that the jury could infer from the absence of this official, among others, that his testimony would have been harmful to the government's case. I agree with the reasoning of courts and commentators who reject the appropriateness of a missing witness instruction in this context, because it does not accurately reflect the situation. *Morrison v. United States*, 365 F.2d 521, 524 (D.C. Cir. 1966), discussed in *Compelled Testimony, supra* n. 25 at 974.

were customers of Pressner Trading Corporation who dealt with Joseph Hamilton and Jules Nordlicht, that their accounts were traded on a significant account, the "97" account, and yet they never met or knew of defendants. From this testimony the defendants would have the jury draw the inference that defendants were neither necessarily nor actually involved in the rigging scheme with Jules Nordlicht and Joseph Hamilton. I find that inference too strained to satisfy the materiality standard.

J. S. Morris & Co. Principals—Two of the Pressner Trading Corporation customers referred to above are principals of J. S. Morris & Co., which had an account at Pressner Trading Corporation. According to defendants, they would testify that they dealt only with Messrs. Nordlicht and Hamilton in effecting J. S. Morris & Co., crude oil money transfer trades, not with defendants. This proposed testimony would not be material. The government never contended that any of the customers or principals referred to above had any contact with defendants, and their lack of contact certainly is not materially indicative of defendants' lack of involvement in the overall scheme.

Another floor broker would testify as to common practices of floor brokers and also would contradict the testimony of Alfred Perlmuter, brought out on cross-examination, that defendant Turkish, Mr. Perlmutter and he engaged in money transfer transactions in commodities other than crude oil. As stated above, the testimony as to common practices of floor brokers is not material (p. 22, *supra*) and testimony offered to contradict Mr. Perlmutter's testimony on cross-examination is not admissible (p. 22-3, *supra*).

A principal of C. R. Rittenberry & Associates, Inc., the oil company on whose behalf the tax straddles were placed, would be called to testify regarding the back-

ground and nature of the relationship between the oil company and the crude oil market, and the efforts of the oil company to structure a tax straddle. This testimony is considerably more speculative and amorphous than the represented testimony of other proposed defense witnesses. While imprecise testimony is not *per se* immaterial, I find that in light of all the other evidence in the case, his testimony could not reasonably affect the outcome.

A principal of Genora Trading Company ("Genora") in 1974, 1975, and 1976. Crude oil trades placed by this person, members of his family, and Genora paralleled trades placed on behalf of Rittenberry.[28] Mr. Joseph Hamilton was the broker on both sides of most of these trades. This person would testify that he, his family, and Genora were seeking long term capital gains through their straddles. This information is significant because the market manipulation facilitated long term capital gain, although Rittenberry was not seeking long term capital gain through its straddles.

Both Joseph and Marshall Hamilton maintained accounts at Genora through which many of the money transfers in this case were conducted. According to defendants, the proposed witness would testify that he dealt with Mr. Joseph Hamilton, and that defendants had nothing to do with the money transfer transactions or the transactions of him and his family and Genora.[29]

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[28] This proposed witness was under indictment at the time of trial by a New York State grand jury for allegedly fraudulent tax straddles in crude oil futures contracts on the New York Cotton Exchange. However, I have not been advised whether the trades involved in the indictment are those trades which were placed parallel to the Rittenberry trades.

[29] The jury also inquired whether it could draw an inference from the absence of testimony by this proposed witness.

The above testimony does not tend to prove that defendants had no part in the Rittenberry scheme. The connection between Hamilton and this person is likely to have been a separate, though factually related, scheme engaged in by Joseph Hamilton to increase his own profits. It is not reasonably likely that the jury would infer from all of the testimony that because the defendants were not involved with Joseph Hamilton in the Genora and other trades, defendants were not involved with Hamilton in the Rittenberry trades. I find that the proposed testimony of the proposed witness does not meet the materiality requirement.

One proposed witness is a Vice President of Rittenberry. Defendant Kellogg and defense witness Lowell Noble testified at trial that this person determined all of the elements of the crude oil trades placed on behalf of Rittenberry. Defendant Turkish argues that if this person testifies that he planned the crude oil trades, this testimony would severely undermine the government's theory that Mr. Turkish was the architect of the scheme. Defendant Kellogg represents that the person would testify that he directed investments in commodities with the objectives of hedging current inventory positions of Rittenberry and deferring taxes for one or more years. According to defendant Kellogg, this person would also testify that he directed all Rittenberry trades in the crude oil market in 1974, 1975, and 1976, and that, to his knowledge, neither he nor defendant Kellogg, through whom the person placed the Rittenberry trades, knew of manipulated or prearranged trading in the crude oil market.

The proposed testimony by this person that he directed the Rittenberry trades is cumulative of the testimony of Mr. Noble and defendant Kellogg.[30] Its cumulative nature,

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[30] The inappropriateness of denying access to a witness' testimony because it may be cumulative of testimony given by a defendant is discussed at n. 25, *supra*.

however, is not a compelling reason to deny defendant Turkish's motion; the proposed witness would be testifying to his own actions, whereas Mr. Noble testified to the actions of someone else. The jury might have given more weight to the first person testimony of the proposed witness.

However, in light of the entire record before me, I find that the testimony of this person that he planned the Rittenberry trades would not reasonably have affected the case against defendant Turkish. The testimony against Mr. Turkish was overwhelming. Testimony by the proposed witness that he planned the trades for Rittenberry is not inconsistent with the role found to have been played by Mr. Turkish. They may have been working together. In other words, the person may have been an additional participant in the scheme, not a replacement for Mr. Turkish. Alternatively, the person may have planned straddles and at the same time may have had no knowledge of nor participation in the rigging which occurred to facilitate the straddles. In either case, the evidence against Mr. Turkish would not be sufficiently undermined by the proposed testimony to meet the materiality standard.

However, the testimony by this person that he directed the trades for Rittenberry is reasonably likely to have affected the case against defendant Kellogg. If the proposed witness was the contact at Rittenberry, there would have been no need for Mr. Kellogg to choose trades for Rittenberry; he could have been merely a technical conduit through whom the orders passed from Rittenberry (the proposed witness) to Bear Stearns (Turkish). In this context, testimony by the person that he directed Rittenberry's trades and that to his knowledge Mr. Kel-

logg had no knowledge of market manipulation becomes significant. It meets the materiality standard in light of the total evidence presented linking Kellogg to the crime charged.

The proposed witness' prospective testimony and posture must, however, have been known to Kellogg soon after the indictment was returned if not before. Yet throughout the pre-trial phase—extended at the behest of defendants to facilitate their preparation—no application was made to the court with respect to that testimony. The application with respect to this person's testimony was only made after the trial had started and the government's case had been completed. (*See* Section IV, *supra*).

VINCENT L. BRODERICK, U.S.D.J.

Dated: New York, New York
October 17, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

79-1326

Filed: Jul 3 1980

UNITED STATES OF AMERICA,

Appellee,

—v.—

NORMAN TURKISH,

Appellant.

Present: HONORABLE WALTER R. MANSFIELD
HONORABLE JON O. NEWMAN
HONORABLE J. EDWARD LUMBARD
Circuit Judges.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of July, one thousand nine hundred and eighty.

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

79-1326

Filed: Jul 3 1980

UNITED STATES OF AMERICA,

Appellee,

—v.—

NORMAN TURKISH,

Appellant.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of July, one hundred nine hundred and eighty.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

WILFRED FERNLEUG
Chief Judge

APPENDIX E

Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of May one thousand nine hundred and eighty.

Present: HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
HON. JON O. NEWMAN
Circuit Judges,

79-1326, 79-1396

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NORMAN TURKISH, et al.,
Defendants,

NORMAN TURKISH, MICHAEL A. KELLOGG,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

APPENDIX E

Order of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

/s/ ARTHUR HELLER
by: ARTHUR HELLER,
Deputy Clerk